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No. 76-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976 **76-1227**

HAWAIIAN HAULING SERVICE COMPANY, LTD., *Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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TABLE OF CONTENTS

	Page
ORDERS AND OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
STATUTE INVOLVED	2
STATEMENT OF THE CASE	3
A. The Undisputed Facts	3
B. The Administrative Law Judge's Recommended Decision and Order	4
C. The Decision and Order of the National Labor Relations Board	5
D. The Decision of the Court of Appeals	6
REASONS FOR GRANTING THE WRIT	7
I. The Board's Refusal To Abide by the Arbitrator's Factual Conclusions Seriously Undermines the National Labor Policy Encouraging Final Adjustment of Disputes by Arbitration as Agreed Upon by the Parties	7
II. The Board's Extension of the Protection of the Act to Deliberate Falsehoods Made in the Course of Collective Bargaining Does Not Promote Equality of Bargaining Power and Is Clearly Erroneous as a Matter of Law	15
III. The Court of Appeals Applied an Improper Standard of Review in Determining Whether the Board Abused Its Discretion in Overturning the Arbitrator's Award and in Construing the Scope of Section 7 of the Act	16
CONCLUSION	18

CITATIONS

Page

CASES:

Associated Press v. NLRB, 492 F.2d 662 (D.C. Cir. 1974) 11
Banyard v. NLRB, 505 F.2d 342 (D.C. Cir. 1974) 11
Bayside Enterprises, Inc. v. NLRB, — U.S. —, 97 S.Ct. 576 (1977) 17
Boys Markets v. Retail Store Employees, 398 U.S. 235 (1970) 7
Byron Jackson, Inc., 49 L.A. 731 (Kotin, 1967) 14
Cannon v. Consolidated Freightways Corp., 524 F.2d 290 (5th Cir. 1975) 10
Chemical Wkrs. v. Pittsburgh Plate Glass Co., 404 U.S. 157 (1971) 17
Crown Central Petroleum Corp., 117 NLRB 322 (1969), *enfd*, 430 F.2d 724 (5th Cir. 1970) 4, 6, 15
Dallas Typographical Union v. A. H. Belo Corp., 372 F.2d 577 (5th Cir. 1967) 10
Derby Coal and Oil Co., 139 NLRB 1485 (1962) 16
Electronic Reproduction Service Corp., 213 NLRB 758 (1974) 6, 10, 11, 14
Filmation, Inc., 227 NLRB No. 237 (1977) — LRRM — 9, 11, 14
Florida Power & Light v. Electrical Wkrs., 417 U.S. 790 (1974) 17
Gulf States Tel. Co. v. Teamsters, Local 1692, 416 F.2d 198 (5th Cir. 1969) 8, 10
ICC v. Hoboken Mfgs.' Railroad Co., 320 U.S. 368 (1943), *reh. denied*, 321 U.S. 801 (1944) 16-17
International Harvester, 138 NLRB 923 (1962), *enfd sub nom.* Ramsey v. NLRB, 327 F.2d 784 (7th Cir. 1964), *cited in* Carey v. Westinghouse Corp., 375 U.S. 261 (1964) 11-12
Letter Carriers v. Austin, 418 U.S. 264 (1974) 15
Ludwig Honold Mfg. Co. v. Fletcher, 405 F.2d 1123 (3d Cir. 1969) 10
Mayes Bros., Inc., 153 NLRB 18 (1965), *enfd as mod.*, 383 F.2d 242 (5th Cir. 1967) 16
NLRB v. Acme Industrial Co., 385 U.S. 432 (1967) ... 16
NLRB v. Auburn Rubber Co., 384 F.2d 1 (10th Cir. 1967) 11
NLRB v. C & C Plywood Corp., 385 U.S. 421 (1967).. 16

Page

NLRB v. Hearst Publications, 322 U.S. 111 (1944) ... 16
NLRB v. Ins. Agents' Union, 361 U.S. 477 (1960) 17
NLRB v. Joseph Weingarten, Inc., 420 U.S. 251 (1975) 13
NLRB v. Mueller Brass Co., 509 F.2d 704 (5th Cir. 1975) 18
NLRB v. Rybold Heater Co., 408 F.2d 888 (6th Cir. 1969) 16
NLRB v. Thor Power Tool Co., 351 F.2d 584 (7th Cir. 1965) 15
NLRB v. Truitt Mfg. Co., 351 U.S. 149 (1956) 16, 17
Owens Corning Fiberglass Corp. v. NLRB, 407 F.2d 1357 (4th Cir. 1969) 15
Ozark Trailers, Inc., 161 NLRB 561 (1966) 16
Pittsburgh Steel Co., 47 L.A. 923 (McDermott, 1966) . 14
Ramsey v. NLRB, 327 F.2d 784 (7th Cir.), *cert. denied*, 377 U.S. 1003 (1964), *enforcing*, 138 NLRB 923 (1962) 11
Sidele Fashions, Inc., 133 NLRB 547 (1961) 16
Spielberg Mfg. Co., 112 NLRB 1080 (1955).....4, 5, 6, 10, 11, 15
Steelworkers v. Enterprise Wheel and Car Corp., 363 U.S. 593 (1960) 7
Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960) 8
Textile Wkrs. v. Darlington Mfg. Co., 380 U.S. 263 (1965) 17
Textile Workers v. Lincoln Mills, 353 U.S. 448 (1951) 8
The Great Atlantic & Pacific Tea Co., Inc., 45 L.A. 495 (Livengood, undated) 14
The Timken Roller Bearing Co., 70 NLRB 500 (1946) 15
UAW v. White Motor Corp., 505 F.2d 1193 (8th Cir. 1974), *cert. denied*, 421 U.S. 92 (1976) 8, 10
Western Sample Book and Printing Co., 209 NLRB 384 (1974) 18

STATUTES:

National Labor Relations Act of 1935, as amended

Section 7 18
Section 8(a)(1) 5, 11, 12
Section 8(a)(3) 6, 11
Section 203(d) 13
Section 301 11

Page

MISCELLANEOUS:

Cox, *The Duty to Bargain in Good Faith*, 71 HARV. L. REV. 1401 (1958) 17

Elkouri & Elkouri, *How Arbitration Works* (BNA 1973) 13, 14

Section 118 "Labor Arbitration Reports" 14

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NATIONAL LABOR RELATIONS BOARD, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

HAWAIIAN HAULING SERVICE COMPANY, LTD., ("the Employer") hereby petitions for a Writ of Certiorari to review the Decision of the United States Court of Appeals for the Ninth Circuit, enforcing an order of the National Labor Relations Board.

ORDERS AND OPINIONS BELOW

The Opinion of the Court of Appeals (Pet. App. pp. 7a-14a) [1] is reported at 545 F.2d 674. The Decision and Order of the National Labor Relations Board and the decision of the Administrative Law Judge (Pet. App. pp. 15a-47a) is reported at 219 NLRB 765.

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[1] "Pet. App." refers to the Appendix attached to the instant petition.

JURISDICTION

The Decision of the Court of Appeals was entered on November 12, 1976.[2] The Employer's timely Petition for Rehearing was denied on December 30, 1976 (Pet. App. p. 1a). The jurisdiction of the Court is invoked under 28 USCA § 1254(1).

QUESTIONS PRESENTED

Did the National Labor Relations Board abuse its discretion in refusing to defer to an arbitration award which concluded that "the discharge in question was proper," where the arbitrator's conclusions turned upon questions of fact and credibility, where the proceedings were fair and regular, and where the parties submitted to the arbitrator the question of whether the grievant's conduct was "protected activity" under the National Labor Relations Act?

Whether an arbitrator's award finding a discharge to be proper is clearly repugnant to the National Labor Relations Act because it sustains the discharge of an employee for stating a deliberate falsehood in the course of a grievance proceeding?

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. §§ 151, *et seq.*) (the "Act") are set forth in the Statutory Appendix, *infra*.

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[2] The National Labor Relations Board submitted a proposed judgment to the Clerk of the Court of Appeals on November 24, 1976 (Pet. App. pp. 2a-6a). On February 24, 1977, the Court of Appeals entered a stay of mandate pending this petition (Pet. App. p. 48a).

STATEMENT OF THE CASE

This petition presents the question whether the Board should accept a *pre-existing* arbitrator's award as dispositive of an identical complaint and identical factual and legal issues to be heard by the Board rather than whether the Board should defer a case to an *available* contract arbitration procedure.

A. The Undisputed Facts

The Collective Bargaining Agreement between the Employer and Hawaii Teamsters and Allied Workers, Local 996 ("the Union") provides that the Employer shall not discharge or discriminate against any employee for legitimate union activity. However, an employee may be discharged for just cause and all discharges are subject to review through a grievance procedure ending in final and binding arbitration by a neutral third party.

Richardson, a shop steward, was terminated by the Employer on October 15, 1973. Beginning on August 1, 1973, Richardson was absent from work contrary to the Employer's policy. While he was absent, the Employer's manager, Rogers, discovered pornographic photographs displayed on Richardson's desk top. Upon his return to work on October 3, 1973, Richardson was given a warning letter for displaying the pornography, a violation of the Employer's house rules. Richardson protested the placing of the warning notice in his personnel file.

Days later, at a grievance meeting, Richardson asserted that Rogers had known about and condoned the display of the photographs. Rogers then denied having previously seen the photographs, and Richardson called

Rogers a liar. Moments later, Richardson was terminated by Rogers.

The arbitrator, C. Frank Damon, Jr., an attorney,[3] issued a final award on February 26, 1974, dismissing the grievance and finding that the "discharge in question was proper." Richardson thereafter filed an unfair labor practice charge with the National Labor Relations Board and a formal hearing was held.

B. The Administrative Law Judge's Recommended Decision and Order

On January 21, 1975, the Board's Administrative Law Judge ("ALJ") issued a decision and recommended order dismissing the complaint and discrediting certain witnesses called by the General Counsel who had not testified at the arbitration hearing. The ALJ found that the arbitrator's award was not "clearly repugnant to the purposes and policies of the Act" and that it was entitled to deferral under the Board's guideline decision in *Spielberg Manufacturing Company,* 112 NLRB 1080 (1955). The ALJ concluded (Pet. App. p. 47a):

> In essence, the question presented to me is the question presented to the arbitrator. The arbitrator denied the grievance and sustained the action of [the Employer] (footnote omitted). Were I to consider only the evidence with respect to events occurring on October 15, it may be that I would disagree with the award of the arbitrator and even conclude that the award was contrary to the holding in *Crown.*[4] But that is not to say that

[3] The Arbitrator was the Chairman of the Ethics Committee, Bar Association of Hawaii in 1965; the President of the Bar Association of Hawaii in 1968; an administrative Assistant to U. S. Senator Hiram T. Fong from 1959-1961, and was the Director of Labor and Industrial Relations, State of Hawaii, in 1962.

[4] *Crown Central Petroleum Corp.,* 117 NLRB 322 (1969), *enfd,* 430 F.2d 724 (5th Cir. 1970).

> the award is "clearly repugnant" to the Act, *or that I would disagree with his award upon all the evidence and arguments which—it is clear from the briefs and reply briefs—were submitted to him.*
>
> In these circumstances, I shall defer to the arbitrator's decision since it is my opinion that the arbitral decision meets the *Spielberg* standards, including the requirement that the decision be not clearly repugnant to the purposes and policies of the Act. (Emphasis added.)

C. The Decision and Order of the National Labor Relations Board

On July 30, 1975, the Board, in a three-to-two decision, reversed the ALJ, refused to defer to the arbitrator's award, and concluded that Hawaiian Hauling Service violated Section 8(a)(1) of the Act by discharging Richardson. The Board majority held that an employee's act of calling his boss a liar in a grievance meeting is *always* protected activity, irrespective of whether or not the employee's statements were deliberate lies. The Board totally ignored the grievant's poor work record, his improper absence, and the context in which Richardson called Rogers a liar. The Board majority thus disregarded the operative facts and industrial setting from which the arbitrator's conclusions had emerged.

The dissenting Board members observed (Pet. App. pp. 22a-23a):

> [T]he arbitrator in effect found that Richardson had crossed the line [of protected grievance activity]. The majority, although paying lip service to *Spielberg,* is substituting its factual judgment for that of the arbitrator and finding that Richardson's conduct fell on the other side of the line. Yet in so doing the majority ignores for

the most part Richardson's work record, the manner in which Richardson called the manager a liar, and the contention that Richardson's grievance defense was wholly fabricated and frivolous. This case does not involve an arbitral award which makes a legal conclusion wholly at odds with the Act, but involves a determination of fact. Thus, in our view, the majority is unwarranted in concluding that the arbitral award reached a result which is clearly repugnant to the policies and purposes of the Act.

D. The Decision of the Court of Appeals

The Ninth Circuit, in a two-to-one opinion,[5] enforced the Board's decision and order, agreeing with the Board's refusal to follow its own policy to accept the arbitrator's factual conclusions set forth in *Electronic Reproduction Service Corp.*, 213 NLRB 758 (1974).[6]

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[5] Judge Wright dissented from the decision of Judges Hufstedler and Van Pelt, Senior District Judge, Nebraska, sitting by designation.

[6] There the Board explained its policy as follows (213 NLRB at 762):

> [W]e are satisfied . . . that the usual and normal practice of parties to collective bargaining agreements is to submit to the arbitrator the central issue of the justness or unjustness of the discipline or discharge and that is the normal practice of parties to submit, and of arbitrators to consider as relevant and in proper circumstances, controlling, evidence of unfairness or unjustness arising out of antiunion discrimination of the type which we consider in cases arising under Section 8(a)(3) of our Act.
>
> Accordingly, we believe the better application of the underlying principles of *Collyer* and *Spielberg* to be that we should give full effect to arbitration awards dealing with discipline or discharge cases, under *Spielberg*, except when unusual circumstances are shown which demonstrate that there were bona fide reasons, other than a mere desire on the part of one party to try the same set of facts before two forums, which caused the failure to introduce such evidence at the arbitration proceeding.

Rather, the Court of Appeals concluded that the Board's decision was governed by *Crown Central Petroleum Corp., supra,* reasoning (Pet. App. p. 10a) that because the discharged employee had "called into question the veracity of management during a grievance meeting", he was entitled to the protection of the Act, and that unless employees are protected in asserting deliberate falsehoods during grievance meetings, their ability to present a grievance as management's equal would be substantially diluted.

REASONS FOR GRANTING THE WRIT

I. The Board's Refusal To Abide by the Arbitrator's Factual Conclusions Seriously Undermines the National Labor Policy Encouraging Final Adjustment of Disputes by Arbitration as Agreed Upon by the Parties.

A. The Board's decision undermines the recognized role of the arbitrator in the scheme of dispute resolution as envisaged by this Court, other federal courts, and by Congress.

Part of the ongoing collective bargaining relationship is the parties' agreement to submit disputes to final and binding arbitration, such awards themselves being enforceable as any other provision of the collective bargaining agreement. *Steelworkers* v. *Enterprise Wheel and Car Corp.*, 363 U.S. 593 (1960). Labor arbitration, which has been hailed as the substitute for recourse to industrial strife, *Boys Markets* v. *Retail Store Employees,* 398 U.S. 235 (1970), was contemplated by the parties as the method of determining such questions as whether, in a given case, just or proper cause exists for discharging an employee who calls his boss a liar.

This Court and numerous Courts of Appeal have recognized that at the very heart of the arbitral process is the role of the arbitrator to weigh evidence and to reach determinations of whether or not, applying the law of the shop, there exists proper cause for a given discharge. In turning to private arbitrators, the parties to a collective bargaining agreement not only recognize the therapeutic value of arbitration, but also they select their arbitrators based upon a familiarity with the problems posed in the particular shop or locale. Deferral on questions of fact is consistent with this recognized role of the arbitrator. *Textile Workers* v. *Lincoln Mills,* 353 U.S. 448, 455 (1951); *Steelworkers* v. *Warrior & Gulf Navigation Co.,* 363 U.S. 574, 582 (1960); *UAW* v. *White Motor Corp.,* 505 F.2d 1193, 1197 (8th Cir. 1974), *cert. denied,* 421 U.S. 92 (1976); *Gulf States Tel. Co.* v. *Teamsters, Local 1692,* 416 F.2d 198, 201 (5th Cir. 1969). The arbitration proceedings herein were fair and regular, all issues before the National Labor Relations Board had been before the arbitrator, and all parties had agreed to be bound by the arbitrator's award. At the request of the Union, the parties also agreed to an informal hearing (Pet. App. p. 42a).

In usurping the function of the arbitrator, the Board majority undercuts a major part of the arbitration system.

The factual setting of this case only exemplifies the arbitrary harm done to the arbitration process when three out of five members of the NLRB deem it appropriate to substitute their remote judgment on questions of fact for the conclusions reached both by the arbitrator, who first viewed the witnesses and was

familiar with the problems of the shop, and by the Board's Administrative Law Judge, who endorsed the arbitrator's conclusions and credibility resolutions following a complete hearing. Compare *Filmation Inc.,* 227 NLRB No. 237 (1977), — LRRM —.

The Board's decision, therefore, arbitrarily conflicts with what this Court said in the *Steelworkers Trilogy* (363 U.S. at 581-82):

> The labor arbitrator's source of law is not confined to the express provisions of the contract, as the industrial common law—the practices of the industry and the shop—is equally a part of the collective bargaining agreement although not expressed in it. The labor arbitrator is usually chosen because of the parties' confidence in his knowledge of the common law of the shop and their trust in her [sic] personal judgment to bring to bear considerations which are not expressed in the contract as criteria for judgment. The parties expect that his judgment of a particular grievance will reflect not only what the contract says, but, insofar as the collective bargaining agreement permits, such factors as the effect upon productivity of a particular result, its consequence to the morale of the shop, his judgment whether tensions will be heightened or diminished. For the parties' objective in using the arbitration process is primarily to further their common goal of uninterrupted production under the agreement, to make the agreement serve their specialized needs. The ablest judge cannot be expected to bring the same experience and competence to bear upon the determination of a grievance, because he cannot be similarly informed.

B. As a result of the Court of Appeals' enforcement of the Board's decision, there now exists a conflict

among the Courts of Appeal over the appropriate judicial deference to be accorded an arbitrator's factual determinations. The Third, Fifth, Seventh, and Eighth Circuits have held that the refusal of courts to review the facts and merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements. The judiciary's function is limited solely to determining whether the arbitral award draws its essence from the contract documents. *UAW* v. *White Motor Corp., supra,* 505 F.2d at 1197; *Cannon* v. *Consolidated Freightways Corp.,* 524 F.2d 290, 294-95 (7th Cir. 1975).

Labor arbitrators are the final judges of both law and fact and their award will not be disturbed for a mistake of either, *Ludwig Honold Mfg. Co.* v. *Fletcher,* 405 F.2d 1123, 1128 (3d Cir. 1969); nor may a court reach a factual determination which differs from that of the arbitrator. *Gulf States Tele. Co.* v. *Teamsters, Local 1692, supra,* 416 F.2d at 201; *Dallas Typographical Union* v. *A. H. Belo Corp.,* 372 F.2d 577, 581 (5th Cir. 1967).

The Ninth Circuit has deviated from this high standard of judicial deference to arbitral awards by approving the Board's failure to defer to the arbitrator's fact resolutions, by failing to require that the Board likewise defer to factual determinations fairly reached, and by sanctioning the Board's disregard of its own policy in *Electronic Reproduction Service, supra.*

Moreover, citing with approval the Board's *Spielberg* decision, the Courts of Appeal have repeatedly voiced their preference for deferring to the arbitral resolution of statutory and unfair labor practice is-

sues.[7] The Tenth Circuit, for example, refused to enforce a Board finding of a Section 8(a)(1) unfair labor practice because a contrary finding had been made by an arbitrator in a proceeding which met all the requirements of *Spielberg.* Thus the Board abused its discretion by failing to defer to the arbitrator. *NLRB* v. *Auburn Rubber Co., Inc.,* 384 F.2d 1, 4 (10th Cir. 1967). The Ninth Circuit, however, refused to apply the same legal standard for review in the instant case.

Such a conflict among the various Circuits clearly requires resolution by this Court in the interest of preserving a uniform labor policy.

C. The Board's decision creates a dual system of review in employee discipline and discharge cases where credibility is in issue, thereby unnecessarily burdening the federal courts and the NLRB. The practical effect of the Board's decision in this case and its subsequent repeated departure from *Spielberg* in *Filmation, Inc., supra,* undermines the congressional policy favoring voluntary adjustment of labor disputes through the arbitration process by creating a dual system of review —one under Sections 8(a)(1) and (3), and one under Section 301 of the Act.

The Board only recently confirmed its disposition to defer to an arbitrator's finding of "just cause" in discharge cases. *Electronic Reproduction Service, supra.* In its opinion, herein, however, the Board evades *Spielberg,* and the import of its progeny (*e.g., International Harvester,* 138 NLRB 923 (1962), *enforced sub nom.*

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[7] See, *e.g., Banyard* v. *NLRB,* 505 F.2d 342 (D.C. Cir. 1974); *Associated Press* v. *NLRB,* 492 F.2d 662 (D.C. Cir. 1974); *NLRB* v. *Auburn Rubber Co., Inc.,* 384 F.2d 1 (10th Cir. 1967); *Ramsey* v. *NLRB,* 327 F.2d 784 (7th Cir.), *cert. denied,* 377 U.S. 1003 (1964), *enforcing,* 138 NLRB 923 (1962).

Ramsey v. *NLRB,* 327 F.2d 784 (7th Cir. 1964), approved by this Court in *Carey* v. *Westinghouse Electric Corp.,* 375 U.S. 261 (1964)), by refusing to defer to an arbitrator's factual findings. Of course, factual findings cannot be repugnant to the Act, yet the new standard of deferral announced by the Board clearly is not whether, based on the facts found by the arbitrator, the legal result is repugnant to the Act; rather, the Board has developed a new test, i.e., whether the record evidence reviewed *de novo* by the Board arguably supports a prima facie violation of Section 8(a)(1). If so, the Board refuses deferral.

This evasion of accepted standards for deferral to arbitration approved by this Court in *Carey* v. *Westinghouse Electric Corp., supra,* virtually guarantees an NLRB hearing to any employee who makes a statement, true or intentionally false, which contributes to disciplinary action. The Board thus invites to its already overburdened docket a new line of cases for post-arbitration review. In the Board's view, no matter how flagrant or intentionally false or aggravated the employee's action or misrepresentation, such predischarge misconduct enjoys the protection of the Act, even if it manifests an attitude which, in an arbitrator's view, must be removed from the plant. To hold otherwise, theorizes the Board majority, "is to substantially dilute an employee's right to fully present his case during grievance and arbitration proceedings as the employer's equal" (Pet. App. p. 17a).

The effect of giving the discharged employee a second opportunity to litigate his grievance in a case where the employee's activity is not clearly protected, and thus, where his discharge is not clearly repugnant to the

policies of the Act, is to invite extensive and widespread relitigation of arbitral decisions before the NLRB contrary to the express Congressional policy favoring arbitration set forth in section 203(d) of the Act (Pet. App. p. 50a).

The policy implications of the Board's disregard for arbitral finality are even more startling in light of *NLRB* v. *Joseph Weingarten, Inc.,* 420 U.S. 251 (1975). In the wake of the decision, it may be anticipated that there will now be frequent confrontations between employees, union officials, and management before management makes a determination as to discipline or discharge. Management must invariably take into account statements made by employees, union representatives and others while investigating employee misconduct. Prudent management, in order to satisfy recognized principles of industrial due process, must conduct a careful investigation and give the grievant a chance to be heard, lest an arbitrator refuse to sustain any action taken. See Elkouri & Elkouri, *How Arbitration Works,* 663 (BNA 1973). The practical consequence of the Board's decision in the instant case is to guarantee all employees or stewards who are discharged following their vocal, hostile or plainly dishonest participation in a prediscipline interview, two bites at the apple—one before the arbitrator and one, concurrently or subsequently, before the National Labor Relations Board, with each forum being asked to determine whether there was proper cause for discipline.

Encouragement of such duplicity of litigation to resolve essentially identical questions of "just cause" for termination is not only obnoxious to those familiar with the practical aspects of collective bargaining and

labor law,[8] it also bodes ill for the dockets of the federal judiciary.

A myriad of arbitration proceedings which heretofore were regarded as "final and binding" will become mere exercises in discovery for ultimate NLRB proceedings. Cases such as *Pittsburgh Steel Co.*, 47 L.A. 923 (McDermott, 1966); *Byron Jackson, Inc.*, 49 L.A. 731, 735 (Kotin, 1967), and *The Great Atlantic & Pacific Tea Co., Inc.*, 45 L.A. 495, 498 (Livengood, undated), involved a grievant who was an active union member or steward who was discharged.[9] Such cases could now be reviewed by the Board, which will freely second guess the factual conclusions of distinguished arbitrators. Indeed, under the Board's rationale in the instant case, most situations in which *Weingarten* rights are accorded will now be relitigated, following arbitration, before the NLRB to determine if, in the Board's view, a factor in management's action was an employee's deliberately and falsely labelling his boss a liar prior to the employee's discharge.

Here, Richardson elected to try the issue of the legitimacy of his discharge under the arbitration provision of the agreement between the Employer and the Union. The issue was fully and fairly litigated before an im-

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[8] Indeed, the Board majority in *Electronic Reproduction Service, supra*, consisted of Chairman Miller, and the Board members Penello and Kennedy, all with considerable practical experience in labor law. The dissenters in *Hawaiian Hauling Service* and *Filmation, Inc., supra*, were Members Penello, Kennedy, and Walther.

[9] For additionual arbitration cases on the issue of union stewards' dishonesty, see the cases digested at Section 118 of "Labor Arbitration Reports." See also Elkouri & Elkouri, *How Arbitration Works*, 647.

partial arbitrator. Like the doctrine of *res judicata* and collateral estoppel, *Spielberg* is intended to promote economy of litigation. A party having had the opportunity to fairly litigate an issue at one forum and lost ought not be permitted to try the same issue in another forum. As the Board noted in 1946:

> [I]t would not comport with the sound exercise of our administrative discretion to permit the Union to seek redress under the Act after having initiated arbitration proceedings which, at the Union's request, resulted in a determination upon the merits. In the interest of ending litigation and otherwise effectuating the policies of the Act, we shall dismiss that portion of the complaint relating to the [arbitrator's award].

The Timken Roller Bearing Co. 70 NLRB 500, 501 (1946).

II. The Board's Extension of the Protection of the Act To Deliberate Falsehoods Made in the Course of Collective Bargaining Does Not Promote Equality of Bargaining Power and Is Clearly Erroneous as a Matter of Law.

If the purposes of arbitration as a system of assuring industrial peace are to be realized, neither the Board nor the Courts ought to protect conduct which converts the grievance and arbitration process into an occasion for implementation of deliberate falsehoods and calulated hostility, as opposed to occasional impulsive outbursts and the promotion of reasoned inquiry. Compare *NLRB* v. *Thor Power Tool Co.*, 351 F.2d 584, 587 (7th Cir. 1965), and *Crown Central Petroleum Corp.* v. *NLRB, supra,* with *Owens Corning Fiberglass Corp.* v. *NLRB,* 407 F.2d 1357, 1365 (4th Cir. 1969), and *Letter Carriers* v. *Austin,* 418 U.S. 264, 277-278 (1974).

The key point made by the Court in *NLRB* v. *Truitt Mfg. Co.*, 351 U.S. 149, 152 (1956) is dispositive on this issue: "Good-faith bargaining necessarily requires that claims made by either bargainer should be honest claims." See also *NLRB* v. *Rybold Heater Co.*, 408 F. 2d 888, 890 (6th Cir. 1969). This absolute requirement of honesty also applies to grievance meetings, since the duty to bargain in good faith continues for the full duration of an agreement. *NLRB* v. *Acme Industrial Co.*, 385 U.S. 432, 436 (1967); *NLRB* v. *C & C Plywood Corp.*, 385 U.S. 421, 430-31 (1967).

The Board's protection of a shop steward or employee's deliberate lies does *not* promote equality in bargaining, since it is unlawful for an employer to furnish false or fabricated information or to make false claims to a union or its representatives during the course of bargaining. *Sidele Fashions, Inc.*, 133 NLRB 547 (1961); *Derby Coal and Oil Co., Inc.*, 139 NLRB 1485 (1962); *Mayes Bros., Inc.*, 153 NLRB 18 (1965), *enf'd as mod.*, 383 F.2d 242 (5th Cir. 1967); *Ozark Trailers, Inc.*, 161 NLRB 561 (1966).

III. The Court of Appeals Applied an Improper Standard of Review in Determining Whether the Board Abused Its Discretion in Overturning the Arbitrator's Award and in Construing the Scope of Section 7 of the Act.

The Court of Appeals stated (Pet. App. p. 10a) that it would not deny enforcement of the Board's order unless the Board abused its discretion by "clearly depart[ing] from its own standards." However, "clear departure" is an erroneous and overly burdensome standard of review in cases involving abuse of agency discretion. Rather, the established standard of review is one of reasonableness. See, *e.g.*, *NLRB* v. *Hearst Publications*, 322 U.S. 111, 131 (1944); *ICC* v. *Hoboken Manufacturers' Railroad Co.*, 320 U.S. 368, 381 (1943), *reh. denied*, 321 U.S. 801 (1944). The Court of Appeals has thus deviated from the standard approved by this Court most recently in *Bayside Enterprises, Inc.* v. *NLRB*, — U.S. —, 97 S.Ct. 576, 580 (1977). There, a standard of reasonableness was applied to determine whether the Board exceeded the bounds of its discretionary judgment entrusted to it by Congress.

The Board's discretion to create unfair labor practices is circumscribed by the law and policy of the Act. *E.g.*, *Florida Power & Light* v. *Electrical Wkrs.*, 417 U.S. 790, 804-05 (1974); *Chemical Wkrs.* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157, 166 (1971); *Textile Wkrs.* v. *Darlington Mfg. Co.*, 380 U.S. 263, 270 (1965); *NLRB* v. *Ins. Agents' Union*, 361 U.S. 477, 497-98 (1960). By holding that the falsity of an employee's accusation is irrelevant and immaterial in these circumstances and by extending the protection of the Act to mendacious conduct, the Board's holding here upheld by the Court of Appeals promotes lying and dishonesty as a means to accomplishing bargaining objectives. The promotion of sham discussions is directly contrary to *NLRB* v. *Truitt Mfg. Co.*, *supra*. See also Cox, *The Duty to Bargain in Good Faith*, 71 HARV. L. REV. 1401 (1958).

Furthermore, the Court of Appeals has failed to make a satisfactory inquiry into the new *de novo* standard of review of arbitrators' credibility and fact findings now applied by the Board. The Board's conclusion follows neither a "clear repugnance" nor even an "arguable repugnance" standard. Rather, the Board's decision arbitrarily deems irrelevant an arbitrator's determination that an employee or union official uses a

deliberate falsehood to advance a grievance, contrary to the Board's practice of regarding dishonesty as relevant to a determination of whether a discharge is for "just cause," for dishonesty is itself just cause for discharge. *Western Sample Book and Printing Co.*, 209 NLRB 384, 391 (1974). An employer has the right to demand that its employees be honest and truthful in every facet of their employment. *NLRB* v. *Mueller Brass Co.*, 509 F.2d 704, 713 (5th Cir. 1975).

Thus, the Board's extension of the protection of Section 7 of the Act in this circumstance is arbitrary. Such an abuse of discretion warrants the exercise of this Court's jurisdiction.

CONCLUSION

For the foregoing reasons the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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March 4, 1977

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

HAWAIIAN HAULING SERVICE, LTD., Petitioner, v. NATIONAL LABOR RELATIONS BOARD, Respondent.	No. 75-2827 ORDER

Before: HUFSTEDLER and WRIGHT, Circuit Judges, and VAN PELT,* District Judge.

The panel as constituted in the above case has voted unanimously to deny the petition for rehearing. Judges Hufstedler and Wright have voted to reject the suggestion for en banc rehearing, and Judge Van Pelt has recommended against en banc reconsideration.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

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* Honorable Robert Van Pelt, Senior United States District Judge, District of Nebraska, sitting by designation.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

HAWAIIAN HAULING SERVICE, LTD.,)
)
Petitioner,)
)
v.) No. 75-2827
)
NATIONAL LABOR RELATIONS BOARD,)
)
Respondent.)

JUDGMENT

Before: HUFSTEDLER and WRIGHT, Circuit Judges, and VAN PELT,* District Judge.

THIS CAUSE came on to be heard upon a petition filed by Hawaiian Hauling Service, Ltd., to review an order of the National Labor Relations Board issued against said Petitioner, its officers, agents, successors, and assigns, on July 30, 1975, and upon a cross-application filed by the National Labor Relations Board to enforce said order. The Court heard argument of respective counsel on October 7, 1976, and has considered the briefs and transcript of record filed in this cause. On November 12, 1976, the Court being fully advised in the premises, handed down its opinion granting enforcement of the Board's Order. In conformity therewith, it is hereby

ORDERED AND ADJUDGED by the Court that Hawaiian Hauling Service, Ltd., Honolulu, Hawaii, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discharging or disciplining employees because of their protected participation in grievance meetings.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed by Section 7 of the National Labor Relations Act (hereinafter called the Act).

2. Take the following affirmative action which the Board has found necessary to effectuate the policies of the Act:

(a) Offer Joseph R. Richardson immediate and full reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges.

(b) Make Joseph R. Richardson whole for any loss of pay he may have suffered as a result of his unlawful discharge in the manner set forth in the Remedy section of the Board's Decision and Order, a copy of which is attached hereto as Appendix A.

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Judgment.

(d) Post at its place of business at Honolulu, Hawaii, copies of the attached notice marked "Appendix B." Copies of said notice, on forms provided by the Regional Director for Region 20 of the National Labor Relations Board, (San Francisco, California), after being duly signed by the Petitioner's representative, shall be posted by the Petitioner immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Petitioner to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the aforesaid Regional Director, in writing, within 20 days from the date of this Judgment, what steps the Petitioner has taken to comply herewith.

Endorsed, Judgment Filed and Entered

/s/ Emil E. Melfi
Emil E. Melfi
Clerk

/A TRUE COPY,

ATTEST:

Emil E. Melfi
Clerk/

APPENDIX A

Remedy

Having found that Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist therefrom and take certain affirmative action in order to effectuate the policies of the Act.

Having found that Respondent unlawfully discharged employee Joseph R. Richardson, we shall order that Respondent offer him immediate and full reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges and to make him whole for any loss of pay suffered as a result of his unlawful discharge, with backpay computed as prescribed in F. W. Woolworth Company, 90 NLRB 289 (1950), with interest at 6 percent annum as provided in Isis Plumbing & Heating Co., 138 NLRB 716 (1962).

D—9927

APPENDIX B

NOTICE TO EMPLOYEES

POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS
ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a trial in which both sides had the opportunity to present their evidence, the National Labor Relations Board has found that we violated the law and has ordered us to post this notice. We intend to carry out the Order of the Board or the judgment of any court, and to abide by the following:

The Act gives all employees these rights:

To organize themselves
To form, join, or help unions
To bargain collectively through representatives of their choosing
To act together for collective bargaining or other mutual aid and/or protection
To refuse to do any or all of these things.

WE WILL NOT do anything that interferes with or restrains or coerces employees with respect to these rights.

WE WILL NOT discharge or discipline employees because of their participation in grievance meetings.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them in Section 7 of the National Labor Relations Act.

WE WILL offer Joseph R. Richardson immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges, and WE WILL make him whole for any loss of earnings he has suffered.

HAWAIIAN HAULING SERVICE, LTD.
(Employer)

Dated _____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 1111 Kapiolani Boulevard, Honolulu, Hawaii 96814, Telephone 808—546—5100.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

HAWAIIAN HAULING SERVICE, LTD., *Petitioner,*

vs.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

No. 75-2827

OPINION

[November 12, 1976]

On Petition for Review of a Decision and Order of the National Labor Relations Board

Before: HUFSTEDLER and WRIGHT, Circuit Judges, and VAN PELT,* District Judge.

HUFSTEDLER, Circuit Judge:

This appeal presents the question of the proper scope of our review of a National Labor Relations Board ("NLRB") decision[1] refusing to defer to an arbitration award. We conclude that the Board acted within its discretion in refusing to follow the arbitrator's award in this case.

The controversy arises from the discharge of Richardson, an employee of Hawaiian Hauling Service, Ltd., ("HHS"), when Richardson called HHS's general manager a liar at a grievance meeting. Before this incident, Richardson had been employed by HHS for 22 years and had served as a Teamsters Union Shop Steward for 14 years. HHS gave Richardson two warning letters in October, 1973. The first concerned a protracted leave of absence. The second concerned a charge that Richardson had

*Honorable Robert Van Pelt, Senior United States District Judge, District of Nebraska, sitting by designation.

[1] 219 NLRB No. 126, 1974-75 CCH NLRB Decisions ¶16,065 (July 30, 1975).

displayed pornographic photographs on his desk in January, 1972, and May, 1973, which were said to have been discovered and ordered removed on October 3, 1973, by Rogers, HHS's vice president and general manager. On October 15, 1973, Richardson and the union business agent met with Rogers and Richardson's immediate supervisor concerning the warning letters. Richardson contended that Rogers had been aware of the pictures and had condoned the display and that therefore the second warning letter should be rescinded. Rogers denied this, and Richardson called Rogers a liar. Rogers discharged him on the spot, admittedly on account of Richardson's accusation.[2]

The union grieved the discharge to arbitration, contending that Richardson's conduct at the meeting was protected activity within the meaning of 29 U.S.C. § 157. The arbitrator issued an unexplained award in which he ruled that "the discharge in question was proper."[3] The Administrative Law Judge deferred to the award, the NLRB overturned that ruling by a divided vote, and HHS now petitions to deny enforcement.

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[2] *Id.* at 2-3 & n.2.

[3] The parties stipulated that the award would only contain the arbitrator's conclusions, that the award would not comment on any of the evidence, and that no transcript would be made of the hearing. This hearing was held prior to the Board's decision in Electronic Reproduction Service Corp., 213 NLRB 758, 1974-75 CCH NLRB Decisions ¶ 15,046 (1974), in which the Board changed its practice of refusing to defer to an award which gave no indication that the arbitrator actually ruled on the unfair labor practice issue. In *Electronic Reproduction* the NLRB acknowledged that most arbitration hearings are unrecorded and concluded that a decision whether or not a discharge was for "just cause" necessarily decides the statutory issue of discriminatory discharge. The decision was based upon a disapproval of the prior practice of withholding evidence in grievance proceedings for presentation before the Board.

Because of our decision that NLRB refusal to defer was proper under the standards of Spielberg Mfg. Co. (1955) 112 NLRB 1080, we need not decide whether the Board must apply *Electronic Reproduction* to arbitration hearings conducted before the date of that decision and express no opinion on the merits of such application. Nor do we have to decide whether the *Electronic Reproduction* standard is valid. See Banyard v. NLRB (D.C. Cir. 1974) 505 F.2d 342 where the lack of an adequate written explanation for an award was held to require nondeferral.

NLRB deference to an arbitration award is now an integral part of the administration of federal labor law, but Board deference is nonetheless discretionary. As the Court noted in *NLRB v. Plasterers' Union:*

> ". . . [W]here challenged conduct poses an arbitrable dispute under a collective bargaining contract but is also an unfair labor practice within the jurisdiction of the Board, the Board will, as a matter of policy, defer to the arbitral settlement, although it is not bound to do so by the LMRA. Although the Board is not statutorily required to honor arbitration awards in such situations, it often defers to them if the arbitrator has considered the alleged unfair labor practice." ((1971) 404 U.S. 116, 136-37 (citations omitted). *See also* 29 U.S.C. § 160(a).)

Upon review in this court the question is therefore whether the NLRB abused its discretion in reaching its deferral decision.[4] (*Machinists Local 1309 v. NLRB* (9th Cir. 1976) 530 F.2d 849; *Local 700, Machinists Union v. NLRB* (2d Cir. 1975) 525 F.2d 237, 244; *NLRB v. Longshormen's Union Local 27* (9th Cir. 1975) 514 F.2d 481, 483; *Provision House Workers Union Local 274 v. NLRB* (9th Cir. 1974) 493 F.2d 1249; *Associated Press v. NLRB* (D.C. Cir. 1974) 492 F.2d 662, 666; *NLRB v. Horn & Hardart Co.* (2d Cir. 1971) 439 F.2d 674, 679; *NLRB v. Auburn Rubber Co., Inc.* (10th Cir. 1967) 384 F.2d 1, 3.) The Board has established criteria to guide its decision and to this extent self-imposed restraints limit its discretion.[5] In reviewing the Board we must insure that it adheres to its own standards

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[4] An NLRB decision can also be attacked on the basis that the decision, upon review of the record as a whole, was not supported by substantial evidence. Universal Camera Corp. v. NLRB (1951) 340 U.S. 474, 488, 492-96. However, that issue is also not before us as HHS argues only that the Board made errors of law in applying 29 U.S.C. §§ 158(a)(1), (b)(3), and that the Board's deferral decision was an abuse of discretion.

[5] *E.g.*, Spielberg Mfg. Co. (1955) 112 NLRB 1080; International Harvester Co. (1962) 138 NLRB 923; Collyer Insulated Wire (1971) 192 NLRB 837; Electronic Reproduction Service Corp. (1974) 213 NLRB 758. *See* Note, "The NLRB and Deference to Arbitration," (1968) 77 Yale L.J. 1191 for a survey of pre-1968 NLRB deferral practice.

until they are properly changed by the Board. We will not deny enforcement unless the Board clearly departs from its own standards[6] or its standards are themselves invalid. (*Banyard v. NLRB* (D.C. Cir. 1974) 505 F.2d 342, 347; *Provision House Workers, supra,* at 1249; *Horn & Hardart, supra,* at 679; *Auburn Rubber, supra,* at 3.)

The decision of the majority of the Board in this case squarely relied on the *Spielberg* criterion that deferral will be rejected if the arbitral award is repugnant to the purposes and policies of the National Labor Relations Act ("Act"). The majority of the Board thought that the effect of the award "substantially dilute[d] an employee's right to fully present his case during grievance and arbitration proceedings" (219 NLRB No. 126, at 3) by upholding a discharge of an employee who used the epithet "liar" during the grievance proceeding. The Board did not abuse its wide discretion in thus characterizing the effect of the arbitral decision and in refusing to defer to the award.[7] The Board's decision was well within the rationale of *Crown Central Petroleum Corp. v. NLRB* (5th Cir. 1970) 430 F.2d 724. As the *Crown* court appropriately observed, grievance meetings often generate high emotions. Shouting and profanity are common and are protected activities in this setting.[8] Petitioner argues that

[6]"We do not suggest that the Board can announce a policy regarding deference to arbitration and then blithely ignore it, thereby leading astray litigants who depend upon it. But it can change its mind or alter its standards for deference in some respects without necessarily engaging in conduct so blameworthy as to justify our calling it abuse of discretion" (*Horn & Hardart, supra,* 439 F.2d at 679.)

[7]We are not free to substitute our judgment for the Board's even if, as Board members, we might have thought that the minority members' views were more persuasive. *Cf.* NLRB v. Truck Drivers Union (1957) 353 U.S. 87, 96-97. *See generally,* Winter, "Judicial Review of Agency Decisions: The Labor Board and the Court," 1968 Sup. Ct. Rev. 53.

[8]"Neither do we think the language ["damn lies" "these . . . damn lies" Crown Petroleum, 430 F.2d at 726 n.3] used by [the discharged employees] was so approbrious as to carry them 'beyond the pale' of the Act's protection. It has been repeatedly observed that passions run high in labor disputes and that epithets and accusations are commonplace. Grievance meetings arising out of disputes between employer and employee are not calculated to create an aura of total peace and tranquility where compliments are lavishly exchanged. Adding our

Richardson's epithet was itself a deliberate falsehood and thus not protected activity. This argument, however, misses the mark[9] for as the Board noted, "[w]hen Rogers asserted that he had not seen the material on Richardson's desk, Richardson could only meaningfully pursue the grievance" by showing that Rogers' version was false. (219 NLRB No. 126, at 4-5.) Because a large number of grievances turn on credibility, we think the Board was within its discretion when it viewed the dispute from the perspective of the possible chill on pursuing grievances and extended the *Crown* rationale to cover the facts before us.

ENFORCEMENT GRANTED.

WRIGHT, Circuit Judge, dissenting.

I respectfully dissent.

The controlling issue here is whether Richardson's conduct at the October 15 meeting was protected activity. While impulsive behavior may be protected during grievance proceedings, *N.L.R.B. v. Thor Power Tool Co.*, 351 F.2d 584, 587 (7th Cir. 1965); *Crown Central Petroleum Corp. v. N.L.R.B.*, 430 F.2d 724, 730 (5th Cir. 1970), deliberate falsehoods are not. *Owens-Corning Fiberglas Corp. v. N.L.R.B.*, 407 F.2d 1357, 1365 (4th Cir. 1969); *Letter Carriers v. Austin*, 418 U.S. 264, 277-78 (1974). The inquiry is thus whether Richardson's conduct was such as to cross the line of protected grievance activity.

disclaimer to that of the Board, we do not condone the conduct of [the employees] in the meeting, but we do not feel that the interests of collective bargaining will be served by the external imposition of a rigid standard of proper and civilized behavior." *Id.* at 731. *See also,* American Telephone & Telegraph Co. v. NLRB (2d Cir. 1975) 521 F.2d 1159, 1161-62 ("A certain amount of salty language or defiance will be tolerated . . . [in] a closed grievance committee meeting where participants, engaging behind closed doors in a frank discussion of differences, might be expected to exhaust some steam without adversely affecting the employer's conduct of its business").

[9]The authorities cited by petitioner are inapt because they do not involve activities during the course of the grievance procedure. Unlike representation campaigns and contract negotiations, grievance procedures are analogous to litigation.

In submitting the grievance to arbitration, the parties stipulated that the arbitrator's decision would contain only his conclusions, and that a formal transcript would not be made of the testimony and arguments presented there. The award upholding Richardson's termination was made in accordance with the grievance arbitration proceeding established by contract of the parties.

Arbitration enjoys a preferred position in labor law. Congress has declared that "[f]inal adjustment by a method agreed upon by the parties is . . . the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement." 29 U.S.C. § 173 (d) (1970). The Supreme Court has viewed arbitration as serving the national interest by offering an alternative to economic coercion.[1]

Although it is clear that the NLRB need not automatically defer to the arbitrator's decision, *N.L.R.B. v. Acme Industrial* Co., 385 U.S. 432, 437 (1967), it attempts to do so as a matter of policy. *N.L.R.B. v. Plasterers' Union*, 404 U.S. 116, 136-37 (1971); *William E. Arnold Co. v. Carpenters*, 417 U.S. 12, 16-17 (1974).

The Board made its first major statement on deference to arbitration in *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955), where it said that it would not reconsider arbitrators' awards on their merits if the proceedings appeared to be fair and regular, all parties had agreed to be bound, and the decision of the arbitration panel was not clearly repugnant to the purposes and policies of the Labor-Management Relations Act (LMRA). *Id.* at 1082.

In *International Harvester Co.*, 138 N.L.R.B. 923, enforced *sub nom. Ramsey v. N.L.R.B.*, 327 F.2d 784 (7th Cir. 1964), the Board varied the language of the test, stating that it would not adjudicate an unfair labor practice claim which arose from

[1] *United Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574 (1960). As one commentator has noted: "[T]he Supreme Court in 1960 recognized both a broad scope of interpretation and a narrow scope of judicial review for the arbitrator's award. . . . [T]he Court deferred to the arbitration process because it was the method chosen by the parties and because the arbitrator was considered to be most familiar with the functions of the collective bargaining agreement, the operation of the plant, and past practices in the parties' bargaining relationship." Note, 50 Wash. L. Rev. 470, 481 (1976).

the same facts as an arbitrated dispute "unless it clearly appears that the arbitration proceedings were tainted by fraud, collusion, unfairness, or serious procedural irregularities or that the award was clearly repugnant to the purposes and policies of the Act." 138 NLRB at 927.[2]

This test was cited approvingly in *Carey v. Westinghouse Electric Corp.*, 375 U.S. 261, 271 (1964), where the Court compelled an employer to arbitrate even though the Board alone could render a decision binding on the employer and two rival unions.

Under either test, the arbitrator's award in this case should have been upheld. There was no claim that the proceedings were not fair and regular. Rather, the Board held that Richardson's activity was protected and that, by precluding a union from calling the credibility of management witnesses into question, the arbitrator had interfered with the effectiveness of the grievance and arbitration mechanism. Thus, said the Board, the award was clearly repugnant to the policies of the Act. In reversing the arbitrator's award, however, the Board substituted its factual judgment for the arbitrator's in deciding the motivation behind Richardson's conduct.

The Board should defer to the arbitrator's judgment on questions of fact and credibility. *Cf. Electronic Reproduction Service Corp.*, 213 NLRB No. 110 (1974).

The fact that the Board has held that it will not consider deferring to an award unless the unfair labor practice issue was both presented to and considered by the arbitrator[3] does not change the result here.

The parties here stipulated that all relevant issues were properly before the arbitrator. Because the Board was not confronted with differing applicable contractual and statutory standards, the brevity of the arbitral award did not force it to speculate as to the standard applied by the arbitrator. Both the applicable

[2] At least one commentator has viewed this as a drastic extension, rather than a variance of the *Spielberg* doctrine. *See* Note, 77 Yale L.J. 1191, 1192 (1968).

[3] *John Klann Moving & Trucking Co.*, 170 NLRB 1207, *enf'd* 411 F.2d 261 (6th Cir.), *cert. denied*, 396 U.S. 833 (1969). *Accord, Banyard v. NLRB*, 505 F.2d 1342 (D.C. Cir. 1974).

standard as developed by case law and the relevant issues were ably briefed by the parties and presented to the arbitrator for consideration.

The test is not what the written decision contains, but what the arbitrator considered. *Superior Motor Transportation Co., Inc.*, 200 NLRB No. 139 (1972); *Terminal Transport Co.*, 185 NLRB 672 (1970).

The arbitrator's decision meets the standards for deferral. It is not clearly repugnant to the purposes and policies of the LMRA and it is implicit in the decision that the arbitrator considered all relevant issues presented to him.

The decision of the Board should be denied enforcement.

Case 37-CA-988

HAWAIIAN HAULING SERVICE, LTD.

and

JOSEPH R. RICHARDSON

July 30, 1975

Decision and Order

On January 21, 1975, Administrative Law Judge James S. Jenson issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge only to the extent consistent herewith.

1. The complaint alleges that Respondent unlawfully discharged Joseph R. Richardson. The Administrative Law Judge defers to an arbitral decision upholding the discharge since in his opinion that decision meets the *Spielberg* standards.[1].

The General Counsel excepts, contending that the Board should not defer to the arbitrator's award inasmuch as it is repugnant to the policies of the Act. We agree with the General Counsel.

There is no controversy as to the relevant facts. Richardson had been in Respondent's employ for 22 years. He had been the Teamsters Local 996 steward for the past 14 years. In early October 1973, Richardson received two warning letters from Respondent, one regarding a leave of absence he had taken beginning August 8, 1973, and the other re-

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[1] *Spielberg Manufacturing Company*, 112 NLRB 1080 (1955).

garding certain pornographic pictures he had placed under the glass on his desk in January 1972 and May 1973 and which had remained there until Respondent's vice president and general manager, Kelly Rogers, ordered them removed on October 3, 1973. On October 15, 1973, Richardson and the union business representative, Harold DeCosta, had a meeting with Rogers and Respondent's supervisor, Abel Medina, concerning the warning letters. DeCosta informed Rogers and Medina that the Union wanted the warning letters removed from Richardson's file. Rogers declined to do so. DeCosta asked Rogers if he had ever seen the pictures before. Rogers denied that he had. Richardson then called Rogers a liar. Rogers admittedly terminated Richardson for doing so.[2]

The Union grieved the discharge to arbitration. During the arbitration, Respondent contended that Richardson's conduct at the October 15 meeting, viewed against his work record, justified the discharge. Thus, Respondent's brief to the arbitrator states:

> The accusations of the Grievant during the October 15th meeting were as Rogers put it, "The straw that broke the camel's back," and the *Grievant would not have been fired had he not made these statements.* But, the Grievant's entire work record precipitated the final decision. [Emphasis supplied.]

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[2] Rogers testified:

> Q. (By Respondent's counsel, Richard F. Liebman) Can you tell us now, what was the reason, the actual reason that you had for discharging Mr. Richardson?
>
> A. (Mr. Rogers) I felt we had been extremely lenient. The sequence of events, I thought we had already gone overboard. I had gone as for as I could in my job in dealing with the situation; and I felt the man had been given every possibility. Bear in mind I had not even suspended him for the pornography or anything, strictly a warning letter. Not even a day's suspension. Then to sit in front of a supervisor of mine and fabricate a story, calling me a liar. I felt was just absolutely the last straw; there was no way in good conscience I could tolerate that without terminating this man.

The Union contended that Richardson's conduct at the October 15 meeting was protected by Section 7 of the Act and cannot be made the basis for discharge. On February 26, 1974, the arbitrator issued an unexplained award[3] in which he simply stated that based upon the evidence adduced at the hearing it was his decision "that the discharge in question was proper." Accordingly, he denied the grievance.

Richardson admittedly would not have been discharged but for his actions in questioning Rogers' veracity at the October 15 meeting. The arbitrator found that his discharge in that circumstance was justified. The effect of such an award is to substantially dilute an employee's right to fully present his case during grievance and arbitration proceedings as the employer's equal. The award is therefore repugnant to the policies of the Act. We will not defer to such an award.[4]

The applicable standard governing employer conduct when dealing with employees during collective bargaining was set forth long ago in *The Bettcher Manufacturing Corporation*, 76 NLRB 526, 527 (1948). There the Board stated:

> A frank, and not always complimentary, exchange of views must be expected and permitted the negotiators if collective bargaining is to be natural rather than stilted. The negotiators must be free not only to put forth demands and counterdemands, but also to debate and challenge the statements of one another without censorship, *even if, in the course of debate, the veracity of one of the participants occasionally is brought into question.* If an employer were free to discharge an individual employee because he resented a statement

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[3] The issuance of an unexplained award was in accordance with the agreement of the parties as to the procedure to be followed at the arbitration hearing.

[4] *Spielberg Mfg. Co., supra.*

made by that employee during a bargaining conference, either one of two undesirable results would follow: collective bargaining would cease to be between equals (an employee having no parallel method or retaliation), or employees would hesitate ever to participate personally in bargaining negotiations, leaving such matters entirely to their representatives. [Emphasis supplied.]

That principle has since been uniformly followed by the Board.[5] One case in particular is worthy of note, *Crown Central Petroleum Corporation,* 177 NLRB 322 (1969), enfd. 430 F.2d 724 (C.A. 5, 1970). There, the Board, in a factual situation strikingly parallel to the instant case, found that an employer's discipline of an employee for calling an employer representative a liar during a grievance meeting was unlawful, the conduct of the employee being protected.

We recognize, of course, that an employee may engage in conduct during a grievance meeting which is so opprobrious as to be unprotected. We also recognize that in some cases there may be reasonable disagreement as to whether or not that point is reached. In such cases, we will not refuse to defer to an arbitrator's award simply because we would have reached a different result. This is not such a case.

The award here strikes at the very foundation of the grievance and arbitration mechanism. Richardson's grievance as to the warning letter on pornography was based on the premise that Respondent's general manager, Rogers, had condoned his conduct. When Rogers asserted that he had not seen the material on Richardson's desk, Richardson could only meaningfully pursue the grievance by establishing that Rogers was lying. It is true that Richardson could have been more moderate in his language while asserting this position. The lack of this diplomacy does not

[5] See, e.g., *Huttig Sash & Door Company, Inc.,* 154 NLRB 1567 (1965); *Thor Power Tool Company,* 148 NLRB 1379 (1964).

render conduct unprotected. Any attempt to dictate the exact language to be used in the collective-bargaining atmosphere can only have the effect of stifling that bargaining. Moreover, Richardson's statements would still have amounted to essentially the same thing. Richardson was asserting that Rogers was lying. In any case it was not the use of the term "liar" that upset Rogers, but Rogers' claim that Richardson was fabricating a story. Richardson had to either accept Rogers' version of the facts or face discharge. Thus, the only way Richardson could avoid discharge in this circumstance was to withdraw the grievance or to pursue it in a meaningless way. Precluding a union from calling into question the credibility of management witnesses and requiring it to accept management's factual assertions would so heavily weigh the mechanism in the employer's favor as to render it ineffective as an instrument to satisfactorily resolve grievances.[6] The grievance and arbitration mechanism is a vital cog in the machinery for the resolution of industrial disputes. An arbitrator's award which tends to destroy the effectiveness of that mechanism, as the arbitrator's award here does, is clearly repugnant to the policies of the Act.

[6] Respondent contends that Richardson, acting as a union steward, representing himself, was guilty of bad-faith bargaining in violation of Sec. 8(b)(3) when he, according to Respondent, fabricated the claim that Rogers had seen the pornographic material and, therefore, that Richardson lost his protected status. This argument assumes that the truth lies with Rogers' version. Yet that is the very question which the grievance and arbitration is designed to resolve. Respondent cannot be permitted to short-circuit the inquiry in this manner. Moreover, Respondent's position would enable it to take the "master-servant" relationship into the grievance meeting. The relationship at a grievance meeting is not a "master-servant" relationship but a relationship between company advocates on one side and the union advocates on the other side, engaged as equal opposing parties in litigation. *Crown Central Petroleum, supra.* To permit an employer to exercise the power of discharge, where the union has no parallel method of retaliation, solely on the basis that a steward in the employer's view is not telling the truth would destroy that essential relationship.

2. As to the merits, Richardson admittedly would not have been discharged except for his remarks on his own behalf during the grievance meeting. As noted above, remarks of this nature during a grievance meeting are protected. While Respondent's discharge of Richardson for his protected conduct during the collective-bargaining process itself may have been inherently discriminatory,[7] we find it unnecessary to resolve that issue, for we find that in any event such discharge constitutes interference, restraint, and coercion with respect to Section 7 rights. Respondent has thus violated Section 8(a)(1) of the Act.

Remedy

Having found that Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist therefrom and take certain affirmative action in order to effectuate the policies of the Act.

Having found that Respondent unlawfully discharged employee Joseph R. Richardson, we shall order that Respondent offer him immediate and full reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges and to make him whole for any loss of pay suffered as a result of his unlawful discharge, with backpay computed as prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest at 6 percent annum as provided in *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

Order

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Hawaiian Hauling Service, Ltd., Honolulu, Hawaii, its officers, agents, successors, and assigns, shall:

[7] See *N.L.R.B.* v. *Great Dane Trailers, Inc.*, 388 U.S. 26 (1967).

1. Cease and desist from:

(a) Discharging or disciplining employees because of their protected participation in grievance meetings.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Offer Joseph R. Richardson immediate and full reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges.

(b) Make Joseph R. Richardson whole for any loss of pay he may have suffered as a result of his unlawful discharge in the manner set forth in the Remedy section of this Decision and Order.

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its place of business of Honolulu, Hawaii, copies of the attached notice marked "Appendix."[8] Copies of said notice, on forms provided by the Regional Director for Region 20, after being duly signed by the Respondent's representative, shall be posted by the Respondent immediately upon receipt thereof, and be maintained by it for 60

[8] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 20, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

MEMBERS KENNEDY AND PENELLO, dissenting:

Unlike our colleagues, we would adopt the decision of the Administrative Law Judge to defer to the arbitration award herein. The issues in this case were fully presented before the arbitrator, the parties agreed to be bound to arbitration, the proceedings were fair and regular, and the result reached is not clearly repugnant to the purposes and policies of the Act.

Joseph Richardson had received warnings for taking a leave of absence and for displaying pornographic pictures on his desk. He grieved the warnings. At a grievance meeting, he contended that General Manager Rogers had condoned his display of pictures. When Rogers said he had not previously seen the pictures, Richardson called him a liar. Richardson was thereupon discharged. At the arbitration hearing on Richardson's discharge, Respondent contended that Richardson's conduct at the grievance meeting was protected activity.

The issue before the arbitrator was not whether Richardson was discharged for pursuing his grievance but involved his conduct at the grievance meeting and whether that conduct was so unwarranted as to cross the line of protected grievance activity. In upholding the discharge, the arbitrator in effect found that Richardson had crossed the line. The majority, although paying lip service to *Spielberg*, is substituting its factual judgment for that of

the arbitrator and finding that Richardson's conduct fell on the other side of the line. Yet in so doing the majority ignores for the most part Richardson's work record, the manner in which Richardson called the manager a liar, and the contention that Richardson's grievance defense was wholly fabricated and frivolous. This case does not involve an arbitral award which makes a legal conclusion wholly at odds with the Act, but involves a determination of fact. Thus, in our view, the majority is unwarranted in concluding that the arbitral award reached a result which is clearly repugnant to the policies and purposes of the Act.

Appendix

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
AN AGENCY OF THE UNITED STATES GOVERNMENT

After a hearing in which both sides had the opportunity to present their evidence, the National Labor Relations Board has found that we violated the law and has ordered us to post this notice. We intend to carry out the Order of the Board or the judgment of any court, and to abide by the following:

The Act gives all employees these rights:

To organize themselves

To form, join, or help unions

To bargain collectively through representatives of their choosing

To act together for collective bargaining or other mutual aid and/or protection

To refuse to do any or all of these things.

WE WILL NOT do anything that interferes with or restrains or coerces employees with respect to these rights.

WE WILL NOT discharge or discipline employees because of their participation in grievance meetings.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them in Section 7 of the National Labor Relations Act.

WE WILL offer Joseph R. Richardson immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges, and WE WILL make him whole for any loss of earnings he has suffered.

HAWAIIAN HAULING SERVICE, LTD.

Decision

STATEMENT OF THE CASE

JAMES S. JENSON, Administrative Law Judge: This case was heard before me in Honolulu, Hawaii, on August 29 and 30, 1974. The complaint, which issued on July 24, 1974, pursuant to a charge filed on April 3, 1974, alleges a violation of Section 8(a)(3) and (1) of the Act. Specifically, the charge alleges that on or about October 15, 1973, Respondent discharged Joseph R. Richardson because of his activities as a union steward and/or because of his other activities on behalf of the Union. Respondent denies Richardson was terminated for the reasons alleged and contends he was discharged for unprotected activities and that the Board should defer to an arbitration award affirming the discharge rendered pursuant to the grievance and arbitration procedures provided in the collective-bargaining agreement between Respondent and Hawaii Teamsters and Allied Workers, Local 996.

All parties were given full opportunity to appear, to introduce evidence, examine and cross-examine witnesses, to argue orally, and to file briefs. Briefs and supplemental case citations were filed by both the Respondent and the General Counsel and have been carefully considered.

Upon the entire record[1] in the case, and from my observation of the witnesses and their demeanor, I make the following:

FINDINGS OF FACT

I. JURISDICTION

Hawaiian Hauling Service, Ltd., herein called Respondent, a Hawaii corporation, is engaged in general trucking, moving, and warehousing operations. During the past year Respondent performed services valued in excess of $50,000 for several Hawaii firms, each of which made purchases or sales of goods and supplies from outside the State of Hawaii in excess of $50,000 annually. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Hawaii Teamsters and Allied Workers, Local 996, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

For a number of years Respondent and Hawaii Teamsters and Allied Workers, Local 996, have been parties to collective-bargaining agreements covering Respondent's trucking, warehouse, and clerical employees.[2] Section 12 of

[1] Certain errors in the transcript are hereby noted and corrected.

[2] Approximately 130 to 150 in number.

the contract provides, in substance, that all controversies between the Union and Respondent will be settled in accordance with the disputes procedures provided for therein. In the event a dispute is not adjusted by step 3 of the disputes procedure, the matter is submitted to a citywide board of adjustment comprised of two representatives designated by the employers in the industry and two by the Union. If the committee is unable to reach a majority decision within 5 days, the grievance may then be submitted to an arbitrator who shall hold a hearing and give a decision within 10 working days. The contract contains a panel of three arbitrators. Each party may strike one arbitrator from the list, and the remaining arbitrator hears and decides the case. The agreement further provides that the decision of the arbitrator "shall be final and binding upon the parties." Section 13 of the contract, entitled "Discharge and Suspension," provides that the Employer may discharge or discipline an employee for, *inter alia,* violation of the Employer's rules or safety regulations, and that the employee shall have the right to protest any discharge, suspension, or warning notice in writing within 10 days, in which case the protest shall be referred immediately to the citywide board of adjustment for determination in accordance with the disputes procedure in section 12. As noted above, if the citywide board of adjustment is unable to reach a decision, the matter may be submitted to an arbitrator.

Kelly Rogers was Respondent's vice president and general manager at all times material herein. Gary Lee and Abel Medina were two of Respondent's supervisors. Anthony Troche and Harold DeCosta were business representatives of Teamsters Local 996, Troche servicing the contract from June 1970 to March 1, 1973, and DeCosta thereafter. Joseph R. Richardson, the Charging Party, commenced working for Respondents in 1952 and was terminated on October 15, 1973. Richardson was one of three

shop stewards, having served as shop steward for the 14 years immediately preceding his termination. He was also a member of the Union's executive board.

B. *Richardson's Activities as a Shop Steward*

The General Counsel contends, apparently, that a contributing factor in Richardson's termination was that he "actively supported employee interests in their relations with management." To support this theory the General Counsel elicited testimony from Troche, DeCosta, and Richardson regarding a number of "complaints," discussed below, which were made to Respondent on behalf of the employees. Sometime in 1972, Troche and Richardson met with Rogers to protest the suspension of Manual DeLaSantos because he had violated a house rule by failing to notify the Employer that he would be absent.[3] DeLaSantos was reinstated. Richardson testified that in "1969 or 1971, I am not too sure," employee Zack Kahoa reported to him that he was not receiving the correct rate of pay. Kahoa had apparently returned to Respondent's employ after 2 years in the army and was working at a lesser rate of pay than his former job had called for. Richardson talked to Rogers who made arrangements for Kahoa to receive the correct rate of pay. There was no indication that the meeting was other than amicable. In the summer of 1972, employee Rodney Hoodnick was suspended because he failed to call in and report that he would be late for work. Richardson talked to either Supervisor Medina or Lee and the suspension was rescinded. Also in the summer of 1972, Richardson complained to Warehouse Supervisor Salong of the fact that a warehouseman was driving a truck. After

[3] Troche, DeCosta, and Richardson testified in terms of "filing grievances," Troche testified at one point that perhaps 10 grievances were written, which comprised 2 to 5 percent of the total number grievances. He then admitted his estimate was too high and could only recall one grievance which was possibly written, than involving a holiday in 1972.

learning there were no drivers around and that it was an emergency, Richardson "gave him permission to use the warehouseman to drive the truck, to help them out, because they were struck," and told Salong that "at least, you should call Abel Medina, and Abel calls me and asks my permission if it is all right for a warehouseman to drive a truck." Sometime in mid-1972, employee Lawrence Souza contacted Richardson because he wanted to transfer from the household division to the terminal division. Richardson talked to Rogers: "I told Kelly Rogers that Souza approached me and told me that he never wanted to be household. Kelly said, 'Well, if I am not mistaken, he signed a paper, and if he signed a paper, he is going to have to stay at household.' I said, 'According to Souza, he said he did not sign no paper.' So, Kelly said, 'I am sorry, but he signed the paper. He is going to stay in household.' So, I told him, 'Okay. When I see Souza, I will tell Souza, and I will tell Souza to come up and talk to you.' So, I did. After I got through talking to Kelly Rogers, I went back to my regular job. Four o'clock, or a quarter after three, Souza came back. And I jumped on Souza. I said, 'Gee, you tried to make me look bad. I talked to Kelly Rogers, and you signed the paper, and I am up there talking to Kelly Rogers, about you did not sign no paper.' And he said, 'No, I did not sign it.' I said, 'You go up now and talk to Kelly Rogers.' So, Lawrence Souza did." A couple of months later Souza was transferred back to the terminal. In June 1972, employee Sam Tai complained to Richardson that he was going to have to work on a holiday, Kamehameha Day, Richardson asked Richard Shigemitsu, who was in charge of the household department, why Tai had to work that day, and that if he did the Company would have to pay him time-and-a-half rate in addition to holiday pay. Shigemitsu disagreed, so Richardson called Troche and together they went to see Rogers. While the details of the conversation are vague, it appears that Troche acted as the spokesman on Tai's behalf, that he and Rogers had an argument,

that Richardson called Rogers a liar, and that Rogers responded, "Don't call me a liar." The matter was resolved to the Union's satisfaction. Also in 1972, Richardson called Troche and complained the Employer was attempting to deny holiday pay to certain employees. The testimony reveals that the only conversation with Respondent regarding this matter was between Rogers and Troche.[4] Troche testified that he and Richardson talked to Rogers sometime in 1972 protesting a reduction in pay for employee Clinton Yoshikawa and that during the conversation Rogers accused Richardson of being a "shit disturber" by "stirring up the men"; that Richardson called Rogers a liar; and that the matter was resolved to the Union's satisfaction. He testified that after the grievance was completed and Richardson had left, that Rogers remarked that Richardson had a lot of control over the men and was stirring them up and "God. Look at my desk. Full of papers and grievances. Christ, this guy is coming in with grievances. I don't know how many more grievances he is going to file."[5] Troche testified that on another occasion Richardson called him because several employees had complained that their paychecks were short. Troche told Richardson to contact David Sensano, Respondent's bookkeeper and accountant, and find out why. Apparently Richardson did so and reported back that the checks were in fact short. Troche then called

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[4] Troche thought he had filed a written grievance over the matter, but, as was the testimony concerning all of the complaints, was quite vague.

[5] As noted in fn. 3, while Troche testified at one point that 10 written grievances had been filed over an approximate 2-year period, and that 2 to 5 percent of the total number of grievances had been in writing, he eventually reduced his estimate of written grievances to one. I conclude therefore that Rogers would not have complained that his desk was "full of papers and grievances," and discredit Troche's testimony regarding this conversation. As will be seen hereafter, further of Troche's testimony convinces me that he did not testify truthfully at all times.

Rogers who said that he would look into the matter and take care of it and that it wouldn't occur any more. After it happened several more times, Rogers complained ". . . that the steward had gone in and raised hell with David Sensano." Troche responded that "if Sensano gave him a smart answer, he is going to get smart right back with him." The parties stipulated that Richardson voiced a complaint to Respondent's management regarding a suspension of William Cahill and that "the matter was resolved."

DeCosta testified there was a continual problem with the Respondent hiring extra help through an outside employment agency instead of calling the union hall for employees, and that he met with Rogers "quite a few" times. Richardson was present at "a few, a couple . . . ."

The General Counsel contends in his brief that Richardson "actively participated in opposing any derogation in the Teamster 996 contract and bargaining unit by any proposed merger of Respondent's bargaining unit with the Oahu Transport bargaining unit represented by the International Longshoremen and Warehousemen's Union." In support of this contention the General Counsel refers in his brief to pages in the transcript wherein Troche testified that Richardson called and reported that "the Big Five was meeting this morning in Mr. Rogers' office" and that he felt Troche should know about it.[6] It appears Troche thought the meetings concerned a merger of the two companies. Troche therefore went to the meeting uninvited, and after learning the meeting was not for that purpose, he left. There is no evidence that Richardson's name was even mentioned or that Respondent was aware that Richardson later contacted the unit employees and encouraged them to vote for Teamsters Local 996 in the event a merger of the two companies took place.

[6] Respondent and Oahu Transport are both subsidiaries of Castle and Cooke.

The General Counsel contends Richardson "persistently complained about the safety of the truck beds of flat bed trailers, and caused management to promise to remedy the defects." Richardson testified that he first approached Supervisor Lee, and then Supervisor Medina, about the fact the flat beds on the trailers were in bad repair and that someone might get hurt, and that after nothing was done he approached Rogers about the matter. Richardson testified as follows regarding his meeting with Rogers: "I told Kelly that the trailer bed is pretty bad and I said, 'I talked to Gary and talked to Abel Medina. And they said something was going to do something about it.' Then Kelly Rogers explained to me, 'Joe, you know, the company is pretty bad shape, that we can't fix it all at one time,' he said, 'But I can promise you that I will fix it, but not all one time. Maybe 1 month or 2 months we will fix one or two. I will get it in shape.' I said, 'that is good enough for me.' "

The General Counsel also refers to two incidents regarding Jet Valet, another company affiliated with Respondent, as evidence that Richardson actively supported employee interests in their relations with management. Apparently the employees of Jet Valet didn't have a shop steward. Richardson learned of two employee problems at Jet Valet and reported them to DeCosta. One of the problems, regarding scheduling, was resolved to the Union's satisfaction by DeCosta, Richardson, and an official of Jet Valet. The other problem involved an employee's suspension and was resolved against the employee after discussions between DeCosta, Richardson, and Rogers.

The General Counsel also contends Richardson "participated in complaining to management and the PUC that the terminal was unsafe because of congestion of freight and vehicles and several safety hazards including rear mirrors and defective brakes." In support of this allegation the General Counsel makes reference to DeCosta's testimony that he voiced complaints to Rogers that "the terminal was

too stacked, there was not room enough for people to move around [7] and . . . problems of the vehicles . . . a cracked rear vision mirror, and various safety features as to the brakes, that I have complaints from the drivers . . . and . . . I did say I was going to the PUC . . . if there was not anything done about it."

The evidence supporting the General Counsel's contention that Richardson "complained that Oahu Transport employees were performing Hawaiian Hauling unit work, and caused management to stop such assignments" is that at some unknown time Richardson heard that an Oahu Transport truck was pulling one of Respondent's containers, and he asked Supervisor Lee "How come?" Lee replied, "Well, it was only for that day. The container was supposed to go out." Richardson replied, "Well, I guess, you know, don't let that happen," and Lee responded, "No, this is it."

The General Counsel also notes that Richardson "protested other disciplinary and safety matters involving employee Bright, accidents, seniority and overtime," and makes reference to the following testimony by DeCosta in support thereof:

> Q. During the period you were business agent and Richardson was the steward, did you have occasion to present any grievances?
>
> A. I think there is a distinction here. I followed up on disciplinary actions that was handed out to employees. I responded to the disciplinary actions quite a bit. We had disciplinary actions on accidents concerning a few people. We had a termination case on Mr. Bright, that I responded to. The grievances I filed were mostly verbally. These grievances concerned seniority problems or overtime, quite a bit.

[7] Which DeCosta had learned from Richardson.

> Q. How did you learn about these problems?
> A. Through Mr. Richardson.

The record shows there were three union shop stewards at Respondent's premises, Richardson, Kaeo, and Kalua. Excepting Richardson's termination, all grievances, except possibly one,[8] were settled between the parties to everyone's satisfaction at the first stage of the contractual disputes procedure, and no unfair labor practices were ever filed by either Respondent or the Union. Richardson testifield on cross-examination that he had a good relationship with Rogers; that he was able to settle all grievances with Rogers on a friendly basis; that when Rogers came with Respondent in 1971, Respondent had been losing money and Rogers had put it on a paying basis and had thanked him in 1972 for his cooperation with the Union; and that he didn't have any dispute with Rogers in 1973 except for his discharge. DeCosta testified at the arbitration hearing that Respondent had a "smooth running shop on labor management relations," and that there had been an "open-door policy. I could go in and talk to them about the problems." [9]

C. *Richardson's Other Activities*

1. Leave of absence

In early 1972, Richardson requested a leave of absence to attend the Golden Gloves tournament on the mainland.

[8] Troche *thought* a written grievance had been filed regarding holiday pay.

[9] It does not appear from the briefs and reply briefs to the arbitrator that evidence regarding Richardson's role as a shop steward in processing "grievances" or complaints was presented to the arbitrator. In *Electronic Reproduction Service Corporation*, 213 NLRB 758 (1974), the Board indicated its disapproval of "piecemeal litigation in which a party may well prefer to have 'two bites of the apple,' trying part of the discharge case before the arbitrator but holding back evidence to its claim so as to be able to pursue the matter in yet another proceeding before this Board."

While Rogers expressed a reluctance to approve the leave, he did approve it since Richardson had already made arrangements and management had permitted it in the past. Rogers advised him, however, that this was the last time, and shortly thereafter posted a notice on the bulletin board to the effect that no more leaves of absence would be granted anyone unless it was of an emergency nature.

A few days prior to August 1, 1973, Richardson requested Supervisor Lee for a leave of absence so that he could work on a movie job on the island of Kauai. Richardson's reason for asking permission of Lee in place of Terminal Superintendent Medina was that he "did not see Abel Medina down on the floor around the terminal."[10] Lee failed to mention the leave of absence to Rogers, who, after noticing Richardson's absence from the floor of the terminal for several days, called Medina to see if Richardson was sick. Medina advised him that Richardson was on leave of absence and that Lee was supposed to have talked to Rogers about it. Rogers then talked to Lee and learned that Lee had indeed authorized the leave even though it was not his responsibility. Lee represented that Richardson would be gone about a month. Because of Lee's action, Rogers put him on probation and advised Lee that he might be terminated. Shortly after Labor Day (September 3) Rogers talked to Lee again and learned that Richardson had been home during the Labor Day weekend and that he might be gone another month. Rogers discussed the matter with DeCosta and expressed disappointment that Richardson had made the leave request of Lee instead of Medina. DeCosta replied that Richardson had informed him that he had "cleared it directly with" Rogers.[11] Rogers responded with the opinion that Richardson had not discussed it with him because Richardson knew that Rogers would not grant

[10] He had requested leaves of absence from Medina on two occasions earlier in 1973.

[11] This testimony was not refuted by DeCosta.

the leave of absence. Rogers asked DeCosta to contact Richardson and get him back on the job as soon as possible.[12]

On October 3, after Richardson had been away from his job over 2 months, Rogers wrote him the following letter:

> Dear Joe:
>
> We must inform you that your absence from work and the manner in which it was handled has placed the management of this company in an extremely embarrassing position with the employees of this company.
>
> We understand that you requested that Gary Lee grant you a leave of absence of approximately one month so that you could work full time on an outside job as a truck driver for some motion picture company. We are puzzled as to why you did not request this from your direct supervisor Abel Medina, Terminal Superintendent, as you have pertaining to your other requests in the past. You know very well that he is your direct supervisor and not Gary Lee.
>
> Several days had passed when we noticed you missing from work and after asking questions we then learned from Gary Lee that he had on his own, contrary to company policy, granted you the leave of absence. You know very well that had I been aware of this and the reasons involved, I would not have under any conditions granted you this leave of absence. We have just recently rejected the request of another employee to attend a three-day religious convention right here in Honolulu. The list of special favors granted to you by this company over the years is very, very long. This recent action of yours has greatly damaged the wonderful esprit de corps that we have developed these

[12] Rogers testified that he had turned down the request of other employees for leaves of absence to work on the same job.

past two years among all of our employees, bargaining and non-bargaining. Both you and Gary Lee have shocked and disappointed us and serious consideration was given concerning the possibility of terminating you both.

Your last day of work was August 1, 1973 and it is now October 3, 1973. This is to officially advise you that if you haven't reported to work on or before Monday, October 15, 1973, you will be terminated.

We have checked with all of our management people and no one is aware of your exact address except that it is believed that you are on the island of Kauai. Therefore, we are sending this letter to your home address in hopes that it will be forwarded to you. In addition, by copy of this letter we are asking the Teamsters Union if they know your contact address and if so if they will be so kind as to forward a copy of this letter to you.

A copy was forwarded to the Union. Later in the day, Rogers added the following longhand postscript at the bottom: "Abel Medina has another letter to personally hand to you, which concerns another matter."

2. The pictures

Also on October 3, Rogers decided to remove and store one of the two desks located at the back of the terminal. One of the decks was used by Richardson and the other was a spare. When he inspected the desks, Rogers found displayed under the glass on Richardson's desk eight photographs which he termed as "hard-core pornography photographs."[13] He returned to his desk, called Medina, and

[13] Richardson had placed three of the pictures under the glass on his desk in January 1972, and added the other five in May 1973. Of the eight, one is of the "Playboy" centerfold type, and the others depict people engaging in a variety of sex acts. Rogers denied

told him that he had never seen such "garbage" and that Medina was to remove the pictures, place them in an envelope, and return them to Rogers.[14] On the same day, Rogers wrote Richardson a second letter, which reads:

> Dear Joe:
>
> You have in our opinion violated Section 2 of our Company House Rules and Regulations. Section 2

he had seen any of the pictures prior to October 3, 1973. Richardson, on the other hand, testified that Rogers had seen the first three pictures around January or February 1972. He later changed his testimony to say that Rogers had seen them in January or February 1973. Troche testified that on an occasion when he had been to the warehouse to discuss a problem, that he, Rogers, and Medina walked to the rear of the warehouse where he stopped to get a drink of water at a water fountain located only 4 or 5 feet from Richardson's desk, and that he observed Rogers looking at the pictures on Richardson's desk. Both Rogers and Medina denied the incident, and the evidence shows convincingly that the water cooler was not 4 or 5 feet from Richardson's desk, but was in fact approximately 90 feet away. Neither Troche, Torres, nor English, all of whom the General Counsel called as witnesses in an attempt to show that Rogers had seen the pictures prior to October 1973, testified at the arbitration hearing (see reference to *Electronic Reprodutcion Service Corp.*, at fn. 9). I discredit Torres' testimony that Rogers had been at Richardson's desk in July or August 1973 while he and Richardson were eating lunch. Not only did Rogers deny being there, but Richardson failed to testify to such an event. I find it hard to believe that Richardson would have forgotten the incident, if it in fact happened, since it was so close to the time of his termination. Accordingly, I do not credit Torres' testimony. English also tesitfied he had seen Rogers in the area of Richardson's desk. His testimony, however, was vague and confusing and not worthy of belief. Both Rogers and Medina testified that Richardson's desk was located in an area where some customer transactions occur, and that women and children are occasionally in the area.

[14] Rogers testified without contradiction that, in September or October 1972, he had found a 6- by 6-foot piece of plywood in a customer area, containing "probably a dozen" "Playboy" magazine pictures, and had ordered that they be taken down "and destroyed in the next 5 minutes."

concerns personal conduct which violates common decency or morality. You have also in our opinion violated Section 12 of our Company House Rules and Regulations which concerns the using of company equipment and or property for purposes other than company business without permission.

We were absolutely shocked to find on display on the top of your desk several hard core pornography photographs of sexual orgies. This garbage has been removed from your desk after being dated and witnessed and is now under lock and key. As a working foreman and a shop steward who is supposed to set an example for the other workers, you have shocked us beyond comprehension.

We believe that the Union would agree with us that this action of yours is sufficient cause for immediate termination. We have spent endless hours in deep concern and meditation concerning you personally and your problems and after much thought have decided to give you one more chance; but you must be aware that this is your final warning. We strongly recommend that you confer with your supervisor, Abel Medina, concerning your personal relationship with this company and your fellow employees. Also, during your long absence there have been many changes within our organization and it would behoove you to get on board.

The following letter, containing copies of the two October 3 letters to Richardson, was sent to the Union:

Gentlemen:

To say the least, we are completely disappointed with Joe Richardson as a working foreman and as a shop steward. We had considered several actions, including

(1) Outright termination

(2) Demotion

(3) Requesting the Union to replace him as shop steward.[15]

As you can see, we have been extremely lenient with him but must advise you that this is the end of the leniency shown to him. He has totally embarrassed us with *ALL* of our employees.

Sincerely,

HAWAIIAN HAULING SERVICE, LTD.

Kelly Rogers
Vice President & General Manager

KR/au

P.S. We have not mailed directly to Joe Richardson the warning letter concerning the hard core pornography photographs. Mr. Abel Medina, our Terminal Superintendent, will hand this letter personally to Joe if and when he returns and we are sending a copy of this letter to your office. This is a sensitive matter and out of respect for Joe's wife and children, we don't want to take the chance of someone else besides Joe opening the envelope.

K. R.

A few days later, Rogers talked to DeCosta who guaranteed that Richardson would be back to work by October 15 and possibly by October 10. On Friday, October 12, Rogers instructed Medina and Sensano to go to Richardson's home,

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[15] Sec. 15 of the collective-bargaining contract, entitled "Stewards," states in pertinent part: "The Union agrees that before designating a shop steward it will discuss his appointment with the Employer and will not appoint or continue as a shop steward any employee whom the Employer shows to be unacceptable because of irresponsibility, incompetency in his work, or any other good cause."

and if Richardson was there to be sure he read the two letters and understood he was to report to work. In the event Richardson was not there, they were to ask Mrs. Richardson to read the "leave of absence" letter, but under no circumstances was she to be given the letter regarding the pictures. The letters were apparently delivered to Richardson by Medina in this fashion. About 3 o'clock that afternoon, Richardson came to the warehouse. After ascertaining that Richardson had read the two letters, Rogers instructed Medina to discuss them with Richardson and to advise him of the changes that had been made in the Company since he had been gone. As Richardson wanted to talk to Rogers, arrangements were made to meet at 3:45. Instead of meeting, however, Richardson went to the union hall "to pay the Union 10 percent for the job the Union gave him on the other island." He returned about 5 p.m. and advised Medina that he had been "down to the Union" and was not going to meet with Rogers.

D. *The Termination*

On Monday morning, October 15, Richardson reported for work. Shortly before 8 o'clock, DeCosta came to the warehouse and told Richardson that he was going to talk to Rogers about the letter he had received regarding the "pornographic material," and wanted Richardson to accompany him. When they arrived at Richardson's office and DeCosta informed Rogers that he wanted to talk about Richardson, Rogers suggested that he and DeCosta first talk alone. DeCosta stated he wanted Richardson present, so Rogers called for Medina to come in and listen. DeCosta led off the meeting by stating that he wanted the Company to remove the warning letters from Richardson's file,[16] which Rogers declined to do. While there is some dispute between the witnesses as to exactly what was said after

[16] Richardson testified that DeCosta stated he was there to have the pictures removed from the file.

that, it is clear that DeCosta asked Rogers if he had ever seen the pictures before, that Rogers denied that he had, that Richardson disputed the fact and called Rogers a liar, and that Rogers terminated Richardson. Rogers admitted that he would not have terminated Richardson had the latter not called him a liar.[17] After learning that Rogers would not change his mind, DeCosta stated the Union would procede under the grievance procedure. The discharge was confirmed by letter the same day.

E. *The Arbitration*

On October 19, 1973, the Union requested, in accordance with the collective-bargaining contract, that the citywide board of adjustment be convened to hear the grievance over Richardson's termination. As the citywide board of adjustment failed to reach a majority decision, on November 5, DeCosta requested "an informal hearing for the arbitration of Mr. Joe Richardson's termination for violation of Company's house rule #2.[18] Let it be known that the Teamsters Union, Local 996, hereby strikes Mr. Stuart

[17] Rogers testified as follows:

> I felt that we have been extremely lenient. The sequence of events, I thought that we had really gone overboard. I had gone as far as I could in my job in dealing with the situation; and I felt the man had been given every possibility. Bear in mind I had not even suspended him for the pornography or anything, strictly a warning letter. Not even a day's suspension. Then to sit in front of a supervisor of mine and fabricate a story, calling me a liar, I felt was just absolutely the last straw; there was no way in good conscience I could tolerate that without terminating this man.

[18] The house rules provide in pertinent part: The following offenses will subject an employee to disciplinary action or discharge: 1. Insubordination or failure or refusal to obey instructions or to perform work as required or assigned. 2. Conduct which violates common decency or morality. 12. Using company equipment and/

Cowan from the list of three (3) eligible and agreed upon arbitrators." [19]

The arbitration was held on January 16 and 17, 1974. The parties entered into the following stipulations with respect to the arbitration proceedings: 1. Respondent and Teamsters Local 996 agreed that an informal arbitration would be conducted before C. F. Damon, Jr., Esq.,[20] to resolve a grievance filed on behalf of Richardson to grieve his discharge from Respondent on October 15, 1973. 2. That the subject grievance and all issues relating thereto were properly before the arbitrator in accordance with the provisions of the current collective-bargaining agreement between the parties, and the parties agreed to be bound by his decision, excluding any statutory remedies available. 3. That all parties received adequate notice of the time and place of the arbitration hearing, and all parties were present and represented by their respective counsel. Counsel for the Union was not a practicing member of the bar. 4. That all parties were given and exercised full opportunity to present any evidence and arguments in support of their respective positions at the hearing. 5. That Richardson and DeCosta testified in support of the subject grievance; and Rogers and Medina testified in support of Respondent's decision to discharge Richardson. 6. That John R. Desha II represented the Union at the hearing; and that Richard F. Liebman represented Respondent. 7. That all parties agreed that the arbitrator would issue a decision, that

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or property for purposes other than company business without permission.

[19] Sec. 12.6 of the contract provides: "Stuart Cowan, Ted Ssukiyama and Frank Damon are hereby appointed as a panel of arbitrators. One (1) arbitrator shall be chosen as follows: Each party may strike one (1) name from the panel and the remaining arbitrator shall serve in the case."

[20] Damon is an attorney in Honolulu.

such decision would only contain his conclusions, and would not contain any comments on the evidence, and that a formal transcript was not requested or made of the testimony and arguments presented at the hearing.

The Respondent and Union each filed a brief and a reply brief with the arbitrator in support of their respective positions. The Employer's brief stated the issues to be: A. What was the basis for the decision to discharge the grievant? B. Did the grievant commit the acts for which he was discharged? C. Was discharge the appropriate penalty? D. Was the grievant acting in the capacity of an independent union steward during the meeting on October 15, 1973, and was this meeting a grievance meeting; were these alleged facts communicated to the Employer; and, would these alleged facts have immunized the grievant from any disciplinary action for his misconduct during that meeting?

The Union's brief stated the issues as: 1. Was the meeting on October 15, 1973, a "grievance meeting" within the meaning of that term and which employers and unions generally accept? 2. Was the conduct of employee in calling his employer, Kelly Rogers, a "liar" at the October 15, 1973, meeting, conduct which is afforded the protection granted by Section 7 of the National Labor Relations Act and which cannot be made the basis for discharge? 3. Can the Employer now raise past conduct, for which warning letters had been sent to employee and placed in his work records, as a basis for discharge?

The briefs and reply briefs of both of the parties recite their respective versions of the testimony and cite and quote extensively from a number of Board and court decisions, including *Crown Central Petroleum Corporation*, 177 NLRB 322 (1969), enfd. 430 F.2d 724 (C.A. 5, 1970), upon which the General Counsel principally relies in contending the decision of arbitrator Damon is repugnant to the policies of the Act. In addition, the employer's brief

refers to several published arbitration decisions which the Union analyzed in its reply brief.

On February 26, 1974, the arbitrator issued the following:

AWARD

> This is an informal arbitration under Section 12 of the collective-bargaining agreement between the parties dated June 4, 1973.
>
> Based upon the evidence adduced at the hearing, it is the decision of the arbitrator that the discharge in question was proper. Accordingly, the grievance is denied and the action of the Employer is sustained.

F. *Contention of the Parties*

The General Counsel contends that Richardson was "discharged for his record of militancy as a steward" and that the case "is squarly [sic] and incontrovertibly governed by the leading case of *Crown Central Petroleum Corporation* . . . ." In contending the Board should not defer to the arbitrator's decision, theGeneral Counsel calls attention to the fact no transcript of the arbitration proceedings was made and that "the arbitrator did not render an explicated decisions." He claims "the Board has long held that in the absence of a showing that the arbitrator considered the statutory issue and correctly, the Board may not defer to the arbitrator's decision," and "in any event, the arbitrator's decision herein plainly is repugnant."

The Respondent contends the evidence shows that Respondent, in discharging Richardson, did not violate the Act; that the issue of whether or not Richardson's discharge was in violation of the Act was in fact presented to the arbitrator as evidenced by the briefs and reply briefs submitted to arbitrator by the respective parties, and that the Board should defer to the arbitrator's award upholding the discharge action.

G. *Conclusions*

The central issue herein is whether the Board should defer to the arbitrator's award rendered in accordance with the grievance-arbitration procedures established by the parties in the contract, or whether the award should be rejected for failure to meet the *Spielberg* requirements.[21]

The General Counsel does not claim that Richardson was inadequately represented, that the arbitration proceedings were not fair and regular, nor that the parties had not agreed to be bound. His argument that the lack of a transcript prevents me from ascertaining the evidence before the arbitrator, whether he considered the unfair labor practice issue, and if so, whether he utilized the proper standard of law in so considering the matter, is unpersuasive. As stated by the trial examiner in *W. R. Grace and Co.*, 179 NLRB 500, 505 (1969), "to adopt the view that a transcript of an arbitration proceeding is a *sine qua non* to Board deferral . . . would impose an unnecessary requirement on the parties and derogate from the full encouragement of the private settlement of disputes by adding a burdensome expense to the agreed-on method of settlement. This is a very real consideration, as is demonstrated by the fact that in the vast majority of arbitration proceedings, no transcript is made." The parties to the arbitration had agreed that a formal transcript would not be made of the testimony and arguments presented at the hearing, and that the arbitrator's decision or award would not contain any comments on the evidence. Furthermore, the General Counsel and Respondent stipulated that the grievance and all issues relating thereto were properly before the arbitrator in accordance with the collective-bargaining contract and agreed to be bound by his decision. Moreover, the briefs and the reply briefs, submitted by Respondent and the Union to the arbitrator following the arbitration hearing,

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[21] *Spielberg Manufacturing Company*, 112 NLRB 1080 (1955).

ably and cogently set forth the contending positions, and, from reading them, I have no doubt that the parties presented substantially the same evidence with respect to events leading up to and including the October 15 meeting, as was presented in this hearing, and that the arbitrator was aware and considered the unfair labor practice issue.[22] My function, then, is to determine whether the arbitrator's decision was "clearly repugnant to the purposes and policies of the Act."[23]

In *Spielberg,* the arbitration board found that the company was justified in refusing to reinstate four individuals. The matter was then fully litigated before a Board trial examiner who found that the four employees had been illegally discriminated against in violation of Section 8(a)(1) and (3) of the Act. The Board, in deferring to the arbitration award, stated "This does not mean that the Board would necessarily decide the issue of the alleged strike misconduct as the arbitration panel did. We do not pass upon that issue." Following *Spielberg,* the Board has adhered to the standard that the question of whether an arbitrator's decision is clearly repugnant to the purposes and policies of the Act "is not to be determined on the basis

[22] The test is not what the written decision contains, but what the arbitrator considered. *Superior Motor Transportation Co., Inc.,* 200 NLRB 892 (1972); *Terminal Transport Co.,* 185 NLRB 672 (1970). In *Spielberg,* an arbitration board voted two to one and "entered a written decision which merely states that the company was justified in refusing to reinstate the four individuals." While the arbitration board did not set forth the basis for its decision, the Board deferred to the arbitration award.

[23] The Board has long held that where an issue presented in an unfair labor practice proceeding has prevously been decided in an arbitration proceeding, the Board will defer to the arbitration award if the proceedings appear to have been fair and regular, all parties had agreed to be bound, and the decision of the arbitration panel is not clearly repugnant to the purposes and policies of the Act.

of whether the Board would reach the same result on the record made before an arbitrator."[24]

In essence, the question presented to me is the question presented to the arbitrator. The arbitrator denied the grievance and sustained the action of the Respondent.[25] Were I to consider only the evidence with respect to events occurring on October 15, it may be that I would disagree with the award of the arbitrator and even conclude that the award was contrary to the holding in *Crown.* But that is not to say that the award is "clearly repugnant" to the Act, or that I would disagree with his award upon all the evidence and arguments which—it is clear from the briefs and reply briefs—were submitted to him.

In these circumstances, I shall defer to the arbitrator's decision since it is my opinion that the arbitral decision meets the *Spielberg* standards, including the requirement that the decision be not clearly repugnant to the purposes and policies of the Act. It is thus unnecessary to decide the substantive merits of the complaint, and accordingly, it should be dismissed. *Electronic Reproduction Service Corporation, supra; Granite City Steel Company,* 211 NLRB 880 (1974); *Superior Motor Transport, supra.*

[Recommended Order omitted from publication.]

[24] *Terminal Transport Company, Inc., supra* at 673.

[25] The General Counsel contends, however, that *Crown Central* Petroleum Corp., "squarly [sic] governs the simple issues posed in the case and can result in but one finding—that Richardson was discharged for his protected activity." The Respondent's brief and the Union's reply brief to the arbitration disclose that both parties presented their views on *Crown Petroleum* to the arbitrator.

United States Court of Appeals

FOR THE NINTH CIRCUIT

FILED

FEB 24 1977

EMIL E. MELFI, JR. CLERK
U. S. COURT OF APPEALS

HAWAIIAN HAULING SERVICE, LTD.

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

No. 75-2827

DC No. 37-CA-988

ORDER STAYING ISSUANCE OF MANDATE

Upon application of Jared H. Jossem

counsel for the Petitioner, and good cause appearing, IT IS ORDERED that the issuance, under Rule 41 (a) of the Federal Rules of Appellate Procedure, of the certified copy of the judgment of this Court in the above cause be and hereby is stayed pending the filing, consideration and disposition by the Supreme Court of the United States of a petition for writ of certiorari to be made by the Petitioner herein, provided such petition is filed in the Clerk's Office of the Supreme Court of the United States on or before March 4, 1977.

In the event the petition for writ of certiorari is granted, then this stay is to continue pending the final disposition of the case by the Supreme Court of the United States.

Shirley M. Hufstedler
United States Circuit Judge.

DATED: SAN FRANCISCO, CALIF.

RECEIVED
FEB 25 1977

Tuttle, Katz, Jossem & Leiden
Attorneys at Law, A Law Corporation

Form No. 10

STATUTORY APPENDIX

STATUTORY APPENDIX

§ 7 Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, such activities . . .

• • • • •

§ 8 (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section [7] of this title . . .

• • • • •

§ 9 (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided,* That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further,* That the bargaining representative has been given opportunity to be present at such adjustment.

• • • • •

§ 10 (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of

adjustment or prevention that has been . . . established by agreement . . .

(c) . . . No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment of any back pay if such individual was suspended or discharged for cause . . . .

* * * * *

§ 203 (d) Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement.

* * * * *

§ 301 (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

* * * * *

Supreme Court, U. S.
FILED
JUN 3 1977
MICHAEL RODAK, JR., CLERK

No. 76-1227

In the Supreme Court of the United States

OCTOBER TERM, 1976

HAWAIIAN HAULING SERVICE COMPANY, LTD., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

WADE H. McCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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General Counsel,

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 7a-14a) is reported at 545 F. 2d 674. The Board's decision and order (Pet. App. 15a-25a) are reported at 219 NLRB 765.

JURISDICTION

The judgment of the court of appeals was entered on November 12, 1976. A timely petition for rehearing was denied on December 30, 1976 (Pet. App. 1a). The petition for a writ of certiorari was filed on March 4, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Board acted within its authority in refusing to defer to an arbitrator's award that upheld the discharge of an employee for remarks made during a grievance meeting, and properly concluded that the discharge violated Section 8(a)(1) of the National Labor Relations Act.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) are set forth at Pet. App. 27a-28a.

STATEMENT

1. Joseph Richardson had been employed by petitioner Hawaiian Hauling Service Company, Ltd. (the "Company") for 22 years and had served as a Union[1] shop steward for the last 14 years. In October 1973, Richardson received two warning letters from the Company's vice-president and general manager, Kelly Rogers. The first letter involved a leave of absence that Richardson had taken commencing August 8, 1973. The second letter involved pornographic pictures that Richardson had placed on his desk in January 1972 and May 1973 and left there until October 3, 1973, when Rogers ordered them removed. (Pet. App. 15a.)

On October 15, 1973, Richardson and Union Business Representative DeCosta met with Rogers and Supervisor Abel Medina to discuss the warning letters. DeCosta informed Rogers and Medina that the Union wanted the warning letters removed from Richardson's file. Rogers declined to remove them. DeCosta then asked Rogers

[1]Hawaii Teamsters and Allied Workers, Local 996.

whether he had ever seen the pictures on Richardson's desk prior to October 1973. When Rogers denied that he had, Richardson called him a liar. Rogers discharged Richardson on the spot, admittedly because of Richardson's accusation. (Pet. App. 15a.)[2]

The Union challenged the discharge through arbitration under the procedures provided in the collective bargaining agreement. The Union contended that Richardson's conduct at the October 15 meeting was activity protected by Section 7 of the Act, 29 U.S.C. 157, and hence could not be made the basis for discharge. The Company, while conceding that the discharge was triggered by Richardson's accusation, contended that Richardson's conduct in this respect was not protected by the Act, and that the discharge was justified. The parties agreed that the arbitrator's decision would contain only his conclusions and would not contain any comments on the evidence. On February 26, 1974, the arbitrator issued an unexplained award in which he ruled that "the discharge in question was proper" (Pet. App. 15a).

On July 24, 1974, the General Counsel of the Board issued a complaint alleging that the Company had discharged Richardson in violation of Section 8(a)(3) and (1) of the Act, 29 U.S.C. 158(a)(3) and (1). In its answer the Company contended that Richardson was discharged because of his unprotected activities and that the Board should defer to the arbitration award (Pet. App. 18a). The administrative law judge agreed to defer to the award and recommended dismissal of the complaint.

[2]Rogers admitted that he would not have terminated Richardson if the latter had not called him a liar (Pet. App. 15a n. 2, 23a).

2. The Board,[3] however, declined to defer to the arbitrator's award, concluding that it was repugnant to the policies of the Act. The Board found that Richardson's remarks at the grievance meeting were protected activity and held that his discharge for those remarks violated Section 8(a)(1) of the Act. (Pet. App. 15a-18a.)

In its opinion the Board stressed that Richardson admittedly would not have been discharged but for his remarks at the October 15 meeting (Pet. App. 15a). It concluded that the effect of the arbitrator's award upholding the discharge was to "substantially dilute an employee's right to fully present his case during grievance and arbitration proceedings as the employer's equal" (*ibid.*). The Board further reasoned (Pet. App. 16a):

> Precluding a union from calling into question the credibility of management witnesses and requiring it to accept management's factual assertions would so heavily weigh the mechanism in the employer's favor as to render it ineffective as an instrument to satisfactorily resolve grievances. The grievance and arbitration mechanism is a vital cog in the machinery for the resolution of industrial disputes. An arbitrator's award which tends to destroy the effectiveness of that mechanism, as the arbitrator's award here does, is clearly repugnant to the policies of the Act. [Footnote omitted.]

3. A divided court of appeals held that "[t]he Board did not abuse its wide discretion in thus characterizing the effect of the arbitral decision and in refusing to defer to the award" (Pet. App. 10a). The court noted that "[t]he Board's decision was well within the rationale of *Crown Central Petroleum Corp.* v. *NLRB* (5th Cir. 1970) 430 F. 2d 724," which

[3]Members Kennedy and Penello dissented from the decision.

recognized that grievance meetings often generate high emotions, that epithets and accusations are commonplace, and that such remarks are "protected activities in this setting" (*ibid.*). The court accordingly sustained the Board's findings and enforced its order.

ARGUMENT

The decision of the court of appeals sustaining the Board's refusal to defer to the arbitrator's award is correct and not in conflict with decisions of this Court or other courts of appeals. No issue warranting review by this Court is presented.

Under Section 10(a) of the National Labor Relations Act, 29 U.S.C. 160(a), the Board has exclusive authority to adjudicate and remedy unfair labor practices. See *National Labor Relations Board* v. *Acme Industrial Co.*, 385 U.S. 432, 435-437. That Section specifically provides that the Board's power to prevent unfair labor practices "shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise * * * ." Thus it is clear that the existence of an arbitration award does not oust the Board of jurisdiction to adjudicate unfair labor practices involving the same subject matter. *National Labor Relations Board* v. *Strong*, 393 U.S. 357, 360-362.

The Board does have a long-standing policy of deferring to an outstanding arbitral award where it has resolved the pending unfair labor practice issue in a manner not repugnant to the Act, where the procedure followed was fair and regular, and where all parties agreed to be bound by the award. See *Spielberg Mfg. Co.*, 112 NLRB 1080. The Board's post-award deferral policy has been noted with approval by this Court. See *Carey* v. *Westinghouse Corp.*, 375 U.S. 261, 271; *National Labor Relations Board* v.

Plasterers' Union, Local 79, 404 U.S. 116, 136-137; *Arnold Co.* v. *Carpenters District Council*, 417 U.S. 12, 16-17. See also *Associated Press* v. *National Labor Relations Board*, 492 F. 2d 662, 666-667 (C.A. D.C.); *National Labor Relations Board* v. *International Longshoremen's & Warehousemen's Union, Local 27*, 514 F. 2d 481, 483 (C.A. 9); *John Klann Moving & Trucking Co.* v. *National Labor Relations Board*, 411 F. 2d 261, 263 (C.A. 6), certiorari denied, 396 U.S. 833. But the fact that the Board may in its discretion elect to defer to the arbitral process does not mean that it is compelled to do so (*National Labor Relations Board* v. *Strong, supra*); if it elects to assert jurisdiction, its decision takes precedence over conflicting arbitral awards enforcing private contract rights (*Carey* v. *Westinghouse Corp., supra*, 375 U.S. at 272).

In the present case the Board reasonably exercised its discretion in declining to defer to an arbitrator's award that it found repugnant to the policies of the Act. See *Radio Television Technical School, Inc.* v. *National Labor Relations Board*, 488 F. 2d 457 (C.A. 3); *Dreis & Krump Mfg. Co., Inc.* v. *National Labor Relations Board*, 544 F. 2d 320 (C.A. 7); *Spielberg Mfg. Co., supra*, 112 NLRB at 1082. The Board has long held, with court approval, that in a bargaining or grievance context an employee is free to question the veracity of employer representatives without losing the protection of the Act. This view recognizes that grievance meetings often are highly charged confrontations that require a special atmosphere of freedom to insure that the parties are truly equal. Accordingly, discipline or discharge of an employee for use of profanity or epithets such as "liar" during a grievance meeting violates Section 8(a)(1) of the Act. See *Crown Central Petroleum Corp.* v. *National Labor Relations Board*, 430 F. 2d 724 (C.A. 5); *Dreis & Krump Mfg. Co., Inc.* v. *National Labor Relations Board, supra*, 544 F. 2d at 328-329; *Linn* v. *United Plant Guard Workers*, 383 U.S. 53, 60-61; *Hugh H. Wilson Corp.* v. *National Labor Relations Board*, 414 F. 2d 1345 (C.A. 3), certiorari denied, 397 U.S. 935; *American Telephone & Telegraph Co.* v. *National Labor Relations Board*, 521 F. 2d 1159 (C.A. 2); *Bettcher Mfg. Corp.*, 76 NLRB 526, 527. The arbitrator's award here is incompatible with those decisions giving statutory protection to employee statements made in the course of a grievance meeting and, as the Board found (Pet. App. 15a), would "substantially dilute an employee's right to fully present his case during grievance and arbitration proceedings."

There is no substance to petitioner's contentions (Pet. 7-16) that the Board improperly refused to credit the arbitrator's factual and credibility determinations. The decision of the arbitrator contained no specific findings at all, merely reciting that the "discharge in question was proper" (Pet. 4). Although the arbitrator might have concluded that the discharge was proper only because he believed that Richardson had deliberately lied, it is equally plausible that he believed that Richardson was telling the truth (or simply mistaken) but regarded his outburst as sufficiently insubordinate to justify dismissal. Under these circumstances, the Board was not required to assume that the arbitrator's decision rested upon a particular factual determination rather than upon a legal determination at odds with the policies of the National Labor Relations Act.[4]

---

[4]There is no conflict in the circuits on this question. The cases cited by petitioner (Pet. 10) suggest only that courts generally should not review the merits of arbitrators' decisions on direct review; they do not hold that the Board is bound by such decisions or that courts of appeals are somehow disabled from enforcing Board orders when the Board has declined to defer to an arbitrator's decision and has found a violation of the Act.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

JOHN S. IRVING,
General Counsel,

JOHN E. HIGGINS, JR.,
Deputy General Counsel,

CARL L. TAYLOR,
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JUNE 1977.

DOJ-1977-06